No. 91-417

In The

Supreme Court of the United States

October Term, 1991

ALVARO QUIROGA,

Petitioner,

vs.

HASBRO, INC. and PLAYSKOOL BABY INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does Section 704(a) of Title VII of the Civil Rights Act of 1964 protect an employee from retaliatory termination or other adverse employment action for complaining both orally and in writing of perceived discriminatory conduct? Does Title VII's protection against retaliation also extend to the right of an employee to retain counsel and engage in settlement negotiations with an employer in an attempt to resolve Title VII claims? Must plaintiff also establish that his perceived Title VII claim is meritorious in order to prove a cause of action for retaliatory termination under Title VII?

2. When the entire trial record discloses that respondents violated Title VII by retaliating against petitioner, did the District Court and Court of Appeals err in imposing sanctions against plaintiff and/or his attorney? Is the subjective bad faith standard for an award of attorneys' fees to a prevailing defendant under Title VII limited or extended by the power to award sanctions under rules, statutes, and the inherent power of the Court?

TABLE OF CONTENTS

TABLE OF AUTHORITES

CASES:

STATUTES:

MISCELANEOUS:

APPENDIX
TABLE OF CONTENTS

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1991

No. _____

ALVARO QUIROGA

v.

HASBRO, INC. and PLAYSKOOL BABY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Alvaro Quiroga respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (App., 1a) is reported at 934 F.2d 497. The earlier Opinion of the United

States Court of Appeals for the Third Circuit (App., 19a) dated February 13, 1991 was vacated by an Order dated March 26, 1991 (App., 37a). The opinion of the United States District Court for the District of New Jersey (App., 47a) is unreported.

JURISDICTION

The Opinion of the United States Court of Appeals for the Third Circuit was filed on June 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1927 of Title 28 of the United States Code (28 U.S.C. §1927) provides in full as follows:

> Any attorney or other person admitted to conduct cases in

any Court of the United States or any Territory thereof who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally such excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

2. Section 2000e-3(a) of Title 42 of the United States Code (42 U.S.C. § 2000e-3(a) provides in pertinent part as follows:

It shall be an unlawful employment practice for an employer against any of his employees, because he has opposed any practice made an unlawful employment practice by this Title, or because he has made a charge,

testified, assisted or participated in any manner in an investigation, proceeding or hearing under this Title.

3. Rule 11 of the Federal Rules of the Civil Procedure provides in pertinent part as follows:

> If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion

or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioner, an individual of Cuban national origin was employed as a Vice President at respondents' Wayne, New Jersey manufacturing facility. He had been employed by respondents and its predecessor entities for approximately 15 years at the time of his termination in May, 1988.

In January, 1988, petitioner received certain information which caused him to conclude that he was being discriminated against compared to similarly situated non-Hispanic employees. This information related to stock options, salary, and bonus awards. As a consequence, petitioner complained

orally of discriminatory treatment to his superior, Edward Jaffy. The complaints by petitioner were repeated to Mr. Jaffy on numerous occasions in the first quarter of 1988. In addition, petitioner also related certain of the same complaints of discrimination to Peter Schmidt, a human resources manager at the Wayne, New Jersey location.

One of the complaints of differental treatment involved stock options. In 1986, petitioner received a stock option award from respondents. In early 1988, petitioner was informed by Mr. Jaffy that he would not receive an option award for the calendar year, 1987. Petitioner requested but was provided no reason for the denial of options.

After telling a superior that he would consult an attorney as to the denial of options if no explanation was forecoming, petitioner was told by Jaffy that he would receive options after formal approval of the award at the April meeting of respondent Hasbro's Board of Directors.

The promise of an award of options did not resolve petitioner's other claims of discrimination. Concerned about the initial basis for denying options, as well as other differental treatment issues, petitioner retained counsel in March 1988. After an extensive meeting with petitioner, counsel transmitted a letter dated April 5, 1988 to Mr. Jaffy summarizing and analyzing plaintiff's various complaints of discrimination (App., 39a). The letter

in question contained a threat to sue respondents for unlawful discrimination but suggested attempting to resolve the matter amicably (App., 42a).

On April 19, 1988, petitioner and his counsel met with representatives of respondent in order to discuss a possible settlement of petitioner's claims. At the meeting a seven part settlement proposal was presented to respondents for their consideration. No settlement was reached at the April 19, 1988 meeting and petitioner continued his employment with respondents.

As noted above, petitioner was informed by Mr. Jaffy that he would receive options in 1988 for the calendar year 1987. After the receipt by respondents of petitioner's counsel's April 5, 1988 letter, and unbeknownst to

petitioner, respondent Hasbro reversed its decision to award petitioner options and removed the formal approval of petitioner's options from respondent Hasbro's Board of Directors agenda. Respondent Hasbro's co-chief operating officer, Alfred Verrecchia, admitted at trial that the removal of pro forma approval of options matter for petitioner from the Hasbro's Board of Directors agenda occurred because of his receipt of the April 5, 1988 letter from petitioner's counsel.

On May 6, 1988, petitioner's counsel sent respondent Hasbro's counsel a letter raising certain questions (App., 43a). The letter contained, along other things, a warning not to unlawfully terminate petitioner. On May 9, 1988, petitioner was summarily

terminated from his position of Vice President of respondent Playskool by representatives of respondents.

At trial, the District Judge, after hearing testimony entered a verdict in favor of respondents. The District Court specifically found that petitioner's conduct, as manifested in the April 5, 1988 and April 19, 1988 settlement conference constituted a constructive or actual resignation of his employment with Hasbro. (App., 59a). The court specifically characterized the April 5, 1988 letter as "crazy" and plaintiff's settlement demands as "extortion". The Court also specifically found that petitioner's choices, when faced with what he believed to be unlawful and discriminatory conduct, was either to accept his employer's decisions or leave its employ. (App., 60a).

After a notice of appeal was filed with United States Court of Appeals for the Third Circuit, respondents moved under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et. seq.) ("Title VII") in the District Court for an award of approximately $125,000 in attorneys' fees and costs. The District Court awarded respondents' counsel the sum of $10,000 in attorneys' fees.

Petitioner filed appeals from both the adverse decision on the merits and the adverse decision on attorneys' fees to the United States Court of Appeals for the Third Circuit. The two appeals were subsequently consolidated for disposition. On February 13, 1991, the United States Court of Appeals for the Third Circuit issued a panel opinion affirming the District Court (App., 19a). On March 26, 1991, the

February 13, 1991 appeal was vacated by the panel (App., 37a). On June 11, 1991, the panel issued a new opinion also affirming the determination of the District Court, but remanding for determination as to whether or not the award of counsel fees to defendants under Title VII could be imposed upon petitioner, his counsel, or both, as a sanction under alternative theories of liability other than Title VII (App., 1a). See 934 F.2d. 975.

At the time of the filing of this petition, no ruling has been made by the the District Court on remand on whether or not attorneys' fees and/or sanctions are to be allocated between plaintiff and his counsel under either Title VII or alternative theories of liability. In addition, respondents have filed a

motion for an award of attorneys' fees in the United States Court of Appeals for the Third Circuit. This motion has not been resolved as of the date of this petition.

REASONS FOR GRANTING THE PETITION

A. THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IMPROPERLY ELIMINATES TITLE VII PROTECTION AGAINST RETALIATORY TERMINATION FROM EMPLOYEES WHO COMPLAIN ABOUT DISCRIMINATORY TREATMENT, RETAIN COUNSEL, AND ENGAGE IN SETTLEMENT NEGOTIATIONS IN AN ATTEMPT TO RESOLVE THEIR CLAIMS.

A leading treatise on employment law summarizes an employee's protection against retaliation as follows:

> [I]t is unlawful employment practice to retaliate in any way against an employee who opposes an employer's discriminatory practice or who takes part in proceedings to enforce rights under Title VII. It is not necessary, however, that the employer's

> acts be proved in fact to have been unlawful. Although participation is protected absolutely, the test for opposition to an employer's allegedly discriminatory acts is one of reasonableness. ...

3 Larson, Employment Discrimination, § 87.00 at 17-65 (Bender, 1990).

Although there may be some question as to the outer limits of an employee's protection against retaliatory treatment under Title VII, there can be no dispute that all activities engaged in by petitioner here are clearly protected under both Title VII and the anti-reprisal provision contained in the New Jersey Law Against Discrimination. N.J.S. 10:5-12(d). Therefore, the astounding result reached by the Court of Appeals for the Third Circuit in this action is clearly at variance with virtually all decisional law protecting

the right of an employee to complain of discrimination, engage counsel, and attempt to settle perceived complaints of discrimination. Indeed, the Third Circuit did not even follow the standard set out by it for a prima facie case of retaliation contained in Jalil v. Avdel Corp., 873 F.2d 701 (3rd Cir. 1989), cert. denied 110 S.Ct. 725 (1990).

In deciding respondents' motion for summary judgment, the District Court properly found that Quiroga had presented a prima facie case of retaliatory discharge. The court found that Quiroga was engaged in protected activity by threatening to file a discrimination suit; and that he was discharged only two weeks after confronting Hasbro with discrimination charges, raising an inference of retaliatory discharge.

Several days after this ruling, at trial and based on usually the same evidence before the court on summary judgment, the District Court found that no prima facie case had been shown since no proof of caustion was offered by petitioner. This strange and inconsistent decision by the District Court was clearly erroneous on its face and should have been the subject of a summary reversal by the Third Circuit Court of Appeals. The Third Circuit did not do so, despite the overwhelming evidence of retaliatory conduct in the record, and it is this omission that mandates an exercise of this Court's power of supervision.

Although the actual scope of the Title VII protection against retaliatory treatment has not been decided by this Court, it is well-settled and not

seriously in dispute that filing a charge or instituting a law suit alleging unlawful discrimination are protected acts under Title VII. Gifford v. Atchison, Topeka and Santa Fe Ry., 29 F.E.P. 1345 (9th Cir. 1982); Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, (5th Cir. 1969). Here, petitioner engaged in acts far less public than filing suit or a charge of discrimination against respondent. Petitioner complained about discrimination for several months in early 1988 to his supervisor, Edward Jaffy. When the complaints were not resolved to petitioner's satisfaction on all issues, petitioner retained counsel. On April 5, 1988, petitioner's counsel transmitted to respondents a letter outlining petitioner's claims of discrimination.

(App., 39a). Subsequent to the receipt of this letter, respondent Hasbro withheld giving respondent stock options for calendar year 1987, a valuable entitlement that he had been promised to him earlier that year. At trial, respondent Hasbro's co-chief operating officer, Alfred Verrecchia, admitted that no stock options were awarded to petitioner because of the content of the April 5, 1988 letter. Subsequently, an attempt was made to resolve petitioner's claims of discrimination through settlement discussions which were unsuccessful in reaching any resolution. On May 9, 1988, petitioner was summarily terminated from his position as a Vice President with respondents in retaliation for his complaints of discrimination.

In order to justify this overwhelming and uncontradicted evidence of retaliatory conduct, Hasbro defended this action solely on the basis that petitioner "resigned." However, nothing in the record substantiates this. Respondents asserted no other substantive defense to petitioner's federal and state retaliation claims. Surprisingly, both the District Court and the Court of Appeals accepted this defense even though there is not a scintilla of evidence in the record to support it. This error must be corrected by this Court, otherwise there will be a substantial retreat from Title VII's protection against retaliatory treatment such as the type that occurred to petitioner in this case.

At trial, the District Court initially erred by characterizing the April 5, 1988 letter (App., 39a) as "crazy" and further characterizing petitioner's settlement offer as "extortion." The District Judge did not comprehend-or did not choose to apply-well-settled precedents, including Jalil, that held that both the letter and the settlement negotiations were absolutely protected against Title VII. There was no claim by respondents here that any of the activities engaged in by petitioner and his counsel were at the outer limits of Title VII's protection against retaliatory termination. The refusal by the District Court to apply Title VII protection to the April 5, 1988 letter (App., 39a) and the April 19, 1988 settlement negotiations,

was apparently due to the fact that the District Court was of the opinion that an executive, such as petitioner, only had two options, accept his employer's discriminatory conduct or resign. This strips Title VII protection from an executive who thought he was the subject of discriminatory treatment and sought explanations from his employers and only when it became clear that he would get no response to his request for an explanation of the discriminatory acts engaged counsel.

If there is no evidence of "resignation" in the record here, then it is obvious that both the decision of the District Court and the Court of Appeals are incorrect. In order to justify its astounding conclusion, it was necessary for both the District

Court and the Court of Appeals to engage in what clearly appear to be distortions of the facts. First, The District court characterized the April 5, 1988 letter as "contemplating departure" from respondents' employ (App., 55a). There is no evidence to support that characterization, as this Court can see from an examination of the letter itself. Second, the District Court then characterized the April 19, 1988 settlement meeting as additional evidence of petitioner's resignation. This characterization of the settlement negotiations was, amazingly, based entirely on the fact that one of the seven parts of petitioner's settlement proposals was that he would resign in exchange for consideration and other matters. Since the settlement proposal

was proffered in its entirety by petitioner, and was rejected by respondents, the issue of resignation never arose. In addition, the only witness who testified for respondents concerning the April 19, 1988 meeting, William Daly, conceded in his testimony that the only mention of resignation occurred as part of an integrated settlement proposal. The omission of this uncontradicted fact in the District Court and Third Circuit opinion makes the factual finding on resignation clearly erroneous.

This doubly erroneous reasoning by the District Court was compounded in a deceitful fashion in the opinion of the Third Circuit Court of Appeals. There, in order to justify a clearly erroneous finding in the District Court, it was necessary for the Third Circuit to quote

the April 5, 1988 letter out of context. This was done by quoting the letter in such a manner as to indicate that it actually was discussing two separate subjects, resignation and settlement. As this court can see from an examination of the letter in question, the two concepts referred to are not contained in the letter. The only reference to a "outplacement agreement" is contained in a sentence seeking a meeting to discuss a settlement of petitioner's claims "that would obviate the necessity of any litigation." (App., 42a). This critical reference is deleted in the opinion and the letter is quoted in an incomplete manner. Therefore, it is impossible to conclude that the letter, standing alone, constituted a resignation.

The critical and unsupported findings of fact in the District Court, that is, that petitioner resigned, should have been reversed by the Third Circuit. Petitioner was engaging in acts protected under Title VII commencing in January 1988 when he began to complaint to his superior of discrimination. These acts were protected under Title VII as was the act of retaining counsel and having counsel transmit the April 5, 1988 letter. (App., 39a). Similarly, the April 19, 1988 settlement discussions were entirely protected from retaliation under Title VII. Therefore, if there is no evidence that petitioner resigned, then respondent has actually offered no defense to petitioner's claims of retaliation, as to which the evidence is

overwhelming. To permit the opinion of the Third Circuit to stand, would be to strip down the protections contained in Title VII, which apply to petitioner, and to reward respondents blatant and unlawful acts of retaliation.

B. THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS AWARDING ATTORNEYS' FEES AND/OR SANCTIONS TO RESPONDENTS IS UNWARRANTED, WHETHER UNDER TITLE VII, RULES, STATUTES, OR THE INHERENT POWER OF THE COURT.

On April 11, 1990 respondents filed a motion for attorneys' fees and costs under Section 706(k) of Title VII and subsequently the District Court awarded $10,000 in attorneys' fees to respondents. Quiroga filed a timely Notice of Appeal on August 24, 1990.

On June 11, 1991 the Third Circuit filed an opinion in the consolidated appeals remanding the issue to the

District Court to consider whether the $10,000 award of attorneys' fees should be levied solely upon petitioner or "also upon his attorney" under alternative theories of liability." (App., 18a).

Consistent with the District Court, the Third Circuit improperly focuses attention on the April 5, 1988 letter written by petitioner's attorney, Stephen R. Mills, mischaracterizing the letter by quoting words from this letter out of context. Most importantly, both the District Court and the Third Circuit ignore the crucial and uncontroverted evidence of respondents' discriminatory acts and behavior prior to April 1988. The Third Circuit gives short shrift to this uncontested evidence by summarily dismissing it, stating that there were

merely "rumblings" between petitioner and respondents in 1987 and by painting petitioner as the complaining, unhappy worker who deserved the discriminatory treatment respondents gave him. (App., 5a).

A review of petitioner's testimony, which was never challenged on cross-examination and was not disputed by any of respondents' witnesses, reveals that petitioner complained of discriminatory treatment beginning in 1987 and clearly, no later than January 1988. As early as January 1988, petitioner asked for explanations for respondents' discriminatory conduct. Petitioner told his supervisors at Hasbro that he would see an attorney about respondents' discriminatory conduct if respondents would not provide an explanation for their

discriminatory conduct. Rather than receiving an explanation from respondents for their discriminatory conduct or respondents discussing the issues that were concerning petitioner (and that petitioner had raised many times prior to April 1988), respondents changed their mind and decided to give him stock options previously denied. The unresolved issues of respondents' discriminatory conduct were still not addressed upon petitioner's receipt of these options, he still wanted to know why he had been and was being discriminated against by respondents. Despite petitioner's repeated attempts to discuss and resolve respondents' discriminatory conduct and his advise to respondents that he would see an attorney if respondents' explanations

were not forthcoming, respondents never provided an explanation, never discussed, and never changed their discriminatory conduct, thus petitioner was forced to seek the assistance of an attorney.

The District Court's and Third Circuit's decisions are clearly erroneous as they completely ignore all of the uncontroverted facts stated above. By so ignoring the facts in this case the Third Circuit departs so far "...from the accepted and usual course of judicial proceedings..." and sanctions "...such a departure by a lower court as to call for an exercize of this Court's power of supervision." United States Supreme Court Rule 10.1(a).

It is apparent that the Third Circuit failed to completely review the trial transcript as the Third Circuit's opinion supports the absurd and factually unsupportable suggestion that the discrimination alleged in petitioner's complaint "appears to [be] an attorney construct." (App., 13a). This statement by the Court shows clear disregard for petitioner's testimony of respondents' confirmed discriminatory conduct even though nothing in the record disputes this testimony. It is clearly erroneous to disregard such uncontroverted testimony. As petitioner's testimony was uncontroverted, the District Court could not make any negative findings regarding the credibility and demeanor of petitioner.

The key flaw in the preceding is the fact that petitioner's testimony was never challenged and discredited by respondents. Therefore, the issue of supporting evidence for petitioner's testimony should not have been addressed. There is clear evidence that respondents could not dispute respondents' discriminatory conduct, its failure to address and correct such discriminatory conduct, and its firing of petitioner in retaliation for his complaints.

Defendants' motion for fees was made pursuant to Title VII. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648, 657 (1978) permits the award of attorneys' fees to "...a prevailing defendant in a Title VII case

upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation even though not brought about in subjective bad faith."

The facts show that petitioner's claim of discrimination was not frivolous, unreasonable or without foundation; he had a good faith basis for his claim and attempted to resolve the problem of respondents' discriminatory conduct even before retaining counsel.

Respondent is not entitled to attorneys' fees under either of the two standards described in Christiansburg, supra. The Christiansburg court made clear that,

> ...a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable,

> or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorneys' fee incurred by the defense.

Christiansburg Garment Co. v. EEOC, 434 U.S. at 422, 54 L.Ed.2d at 657, 98 S.Ct. at 701. The Christiansburg court warned,

> [i]n applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding, that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset,

> the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law of or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Christiansburg Garment Co. v. EEOC, 434 U.S. at 421-422, 54 L.Ed.2d at 657, 98 S.Ct. at 700-1. It is clear that the District Court in this case improperly engaged in such post hoc reasoning and that the Circuit Court sanctioned the District Court's departure so far from the accepted and usual course of judicial proceedings.

The Third Circuit has consistently rejected attorney fee awards based upon such post hoc reasoning. Williams v. Giant Eagle Markets, 883 F.2d 1184, 1193 (3rd Cir. 1989), Ford v. Temple

Hospital, 790 F.2d 343, 350 (3rd Cir. 1986). Both Williams and Ford were Title VII actions where attorneys' fees had been awarded. In Williams the award was against plaintiff and her attorney pursuant to 28 U.S.C. § 1927 ("§ 1927") and in Ford the award was against plaintiff's counsel pursuant to either § 1927 or "...the bad faith exception to the general rule regarding attorneys' fees..." Williams, 883 F.2d at 1187, Ford 790 F.2d at 346. In Williams, the Third Circuit reversed the attorney fee awards, holding "...[t]he imposition of attorneys' fees, under the facts of this case, would deprive a lawyer of his ethical obligation to represent his client realously." 883 F.2d at 1193.

In the instant case, the District Court's departure from the accepted and usual couse of judicial proceedings and the Third Circuit's sanctioning of this departure, is evidenced by the District Court's award of attorneys' fees against petitioner and the Circuit Court's sanction of this award and suggestion that the cost of the award levied might also be shared by petitioner's counsel under alternative theories of liability such as Rule 11 or the Court's "'inherent power' to sanction an attorney who acts in "'bad faith, vexatiously, wantonly or for oppressive reasons.'"" (App., 14a).

Nothing in petitioner's complaint or in respondents' answer suggests some pre-complaint deficiency, as suggested by the District Court and Third Circuit,

such as notice of an unchallengeable defense that petitioner could never rebut, that has supported the award of attorneys' fees in cases like Ford or Cote v. James River Corp. 761 F.2d 60 (1st Cir. 1985). Nothing in the record discloses any type of damaging statement made by petitioner in pretrial discovery that would provide any basis for the District Court's absurd suggestion that petitioner knew that his action was baseless. See, Rodriguez v. Local 112, 50 F.E.P. Cases 806, 808-809 (D. Mass. 1989) (counsel fees were awarded to prevailing defendant as plaintiff basically admitted in his deposition that all of his claims against the defendant union were without substance).

In fact, there was no indication by the District Court in its ruling on summary judgment that petitioners claims were frivolous, including the claims that were dismissed in the granting of partial summary judgment.

Despite the foregoing and based upon the District Court's imaginative statement that petitioner's claim was "utterly without basis" (App. 12a), the Third Circuit suggests that petitioner's attorney may be sanctioned either under Rule 11 or under the Court's inherent powers.

Petitioner's uncontroverted testimony of respondents' discriminatory practices provide the well grounded facts that warranted petitioner filing his complaint in accordance with existing law prohibiting such

discriminatory practices. The uncontroverted fact that petitioner attempted to resolve respondents' discriminatory practices by repeatedly asking respondents to explain and correct such prohibited practices before petitioner sought the assistance of counsel shows the complaint was not interposed for any improper purpose. It is clear that petitioner's complaint was filed in good faith and, therefore, neither petitioner nor his attorney should be sanctioned pursuant to Rule 11.

This Court recently considered the imposition of sanctions under the Court's inherent powers against a litigant in Chambers v. Nasco, Inc. 111 S.Ct. 2123 (1991). As stated in the majority opinion: "Because of their

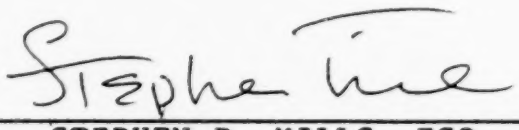
very potency, inherent powers must be exercised with restraint and discretion.... A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process..." Chambers v. Nasco, Inc., 111 S.Ct. at 2132-2133, (citations omitted). Chambers is factually distinguishable from the instant case. Throughout the litigation in Chambers, petitioner had repeatedly been given timely warnings by both the court and respondent that his conduct was sanctionable, and the District Court found his actions were "'part of [a] sordid scheme of deliberate misuse of the judicial process' designed 'to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and

waste of financial resources.'" Chambers v. NASCO, Inc. v. Calcasieu Television & Radio, Inc. 124 F.R.D. 120, 128 (W.D. La. 1989). Here there is no evidence that petitioner's conduct was sanctionable.

If the Third Circuit had reviewed the facts in the instant case as carefully as they had in other cases it is patently obvious that this petition would not have been necessary. As the Third Circuit has sanctioned the District Court's opinion which is so far from the accepted and usual course of judicial proceedings, it is clear that the Third Circuit's opinion must be overturned.

CONCLUSION

For the foregoing reasons, Alvaro Quiroga's Petition for a Writ of Certiorari should be granted.



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September 9, 1991

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 11, 1991

Filed June 11, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-5284 and 90-5748

ALVARO QUIROGA,

Appellant

V.

HASBRO, INC. and PLAYSKOOL BABY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil Action No. 89-01187)

Submitted Under Third Circuit Rule 12(6)
On May 31,1991

Before: HUTCHINSON, NYGAARD and ROSENN,
Circuit Judges

(Opinion Filed June 11, 1991)

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Appendix A

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

In the case underlying these consolidated appeals, Alvaro Quiroga instituted an action against Hasbro and its subsidiary, Playskool Baby, Inc. (collectively, "Hasbro") alleging violations of Title VII, 42 U.S.C. §§ 2000e-2000e-17, the Age Discrimination In Employment Act, 29 U.S.C. §§ 621-634, the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5, *et seq.*, and state claims for breach of contract and intentional infliction of emotional distress. Just before trial, the district court granted summary judgment for defendants on all but the Title VII and comparable NJLAD claims. These remaining claims alleged Quiroga, a vice-president of Hasbro, was wrongfully denied stock options in 1988, and was discharged in retaliation for asserting his rights to those options. Following trial, the district court entered judgment in favor of Hasbro. Upon post-trial motion by Hasbro, the district court also ordered Quiroga to pay Hasbro's attorneys' fees in the amount of $10,000 under Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k).

Quiroga claims in appeal No. 90-5284 that the district court's trial findings are clearly erroneous and that the district court ignored issues of

material fact in its summary judgment. In appeal No. 90-5748, Quiroga claims the district court abused its discretion by awarding Hasbro attorneys fees. We will affirm the district court's orders appealed in No. 90-5284, and for the reasons following we will remand on appeal No. 90-5748. The case is quite simple and ordinarily we would not write, but it is necessary here to explain our decision on appellant's challenge to the district court's attorney fee award.

I.

APPEAL NO. 90-5284

A. SUMMARY JUDGMENT.

The district court summarily dismissed many of Quiroga's claims, including the claim that Hasbro's Personal Policies Manual ("manual") gave Quiroga contractual rights that Hasbro violated when it discharged him. Quiroga challenges only that portion of the summary judgment. He contends that whether the manual applies to him is an unresolved, material question of fact precluding summary judgment, and that the district court misapplied New Jersey law regarding contractual rights created by the manual when it dismissed his claim for breach of contract. Our review of a summary judgment is plenary.

Quiroga's contentions are without support in the record because it does not show that the manual applied to Quiroga as vice-president and plant manager. The affidavit of William Daly, Hasbro's vice president in charge of industrial relations, states that the guide is intended for use by supervisors and managers to assist them in managing personnel matters of the rank and file

employees and does not create rights for supervisors or managers. Daly also stated that unless a specific written employment contract is in place, managers are employed at will. There is nothing in the record to dispute that evidence.

Daly's affidavit carried Hasbro's burden under Rule of Civil Procedure 56 because, in response to Daly's affidavit, Quiroga says only that he was not informed the manual did not apply to him. This does not create a dispute of fact. Quiroga must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Quiroga must set forth specific facts showing a genuine issue for trial and may not rest upon mere allegations, general denials, or such vague statements that he was never informed that the manual did not apply to him. He must offer some evidence that the manual does indeed apply to him. *Soundship Building Company v. Bethlehem Steel*, 533 F.2d 96, 99 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976). Quiroga has simply offered no such evidence. Since Quiroga has not shown that the manual applies to him, we need not consider his contention that the district court misapplied New Jersey contract law. We hold that Quiroga's objection to the summary judgment is without merit.

B. TRIAL FACTS.

Following a bench trial on the remaining claims the district court found the following facts which are germane to its decision and our review. Quiroga was a valued employee of Hasbro and its corporate predecessors from 1974 until he parted

company with them in May, 1988. As vice president of operations in Hasbro's Wayne, New Jersey plant, Quiroga was second-highest ranking employee in New Jersey.

Quiroga received a stock option award in 1986. In 1987 he committed the Wayne plant to production far beyond the company's manufacturing plan. Because of the overproduction, Hasbro sustained losses and seriously considered closing the plant. It did not close the plant, but as a consequence of overproduction, management did not recommend Quiroga for a stock option award for 1987. When in early 1988 Quiroga learned he would not receive the award, he complained to his superiors. Because Hasbro considered Quiroga to be a key person, management reconsidered and added Quiroga's name to the list of those recommended for stock options.

During 1987 there were rumblings between Quiroga and Hasbro's management. Quiroga found himself in disagreement with management decisions. He was disappointed with their decision not to relocate the New Jersey plant to South Carolina, where Quiroga was to have been plant manager. Quiroga viewed Hasbro's decision to scuttle the relocation as a failure to promote him. He was affronted by Hasbro's relocation of his responsibilities to others. He also incorrectly believed he was to be denied a stock option award, and so early in 1988, he hired an attorney. What happened thereafter cost Quiroga his stock options and his job.

Quiroga's attorney, Stephen R. Mills, wrote a letter to Hasbro that the district court found to be "heavy handed" and "extraordinary and outlandish." Attorney Mills claimed that Quiroga

had been "constructively discharged" and suggested a meeting to explore "specific proposals for an outplacement arrangement" for Quiroga and "a possible settlement of Mr. Quiroga's claims." App. 401. The district court found the letter to be Quiroga's announcement that he was "depart[ing] from the company." App. 402.

Nevertheless, and in spite of Attorney Mills' letter, "Hasbro was anxious to retain [Quiroga] in its employ as he was still considered to be an important executive." App. 402. Quiroga, Mills and representatives of Hasbro all met in response to Attorney Mills' letter. At the meeting, Mills stated Hasbro had breached its "trust bridge" with plaintiff. App. 403. Mills issued a seven-point ultimatum to Hasbro:

1. Quiroga would remain at the plant during the "transition" period.

2. Quiroga's package would be $112,000, excluding the company automobile.

3. Quiroga would agree to a release, waiving any claims against Hasbro.

4. Quiroga would seek 3-1/2 years of salary and benefits, totalling $392,000 plus $50,000 in lost options. No attorney's fees would be sought.

5. Quiroga would act as a consultant at half his annual salary, if desired by Hasbro.

6. Hasbro would continue Quiroga's health, dental and life insurance benefits for 18 months.

7. Quiroga would make a statement to all employees.

App. 403-404, 607.

Because of the brash ultimatum issued by his attorney, Quiroga's name was removed from the list of those to receive stock options, which were reserved to reward and encourage employees to stay with the company. Hasbro further informed Quiroga that it accepted his "wishes to resign." App. 405.

C. RETALIATORY DISCHARGE.

Quiroga contends that Hasbro's actions amounted to a retaliatory discharge. In order to recover on his retaliatory discharge claims, Quiroga must show, (1) he engaged in a protected activity; (2) he was discharged after or contemporaneous with the activity; and (3) a causal link existed between the protected activity and threats to sue, and the loss of his job. *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989), *cert. denied*, – U.S.–, 110 S.Ct. 725 (1990).

If a retaliatory discharge plaintiff makes a prima facie showing of all three *Jalil* factors, then the burden "shifts to the defendant 'to articulate a legitimate, nondiscriminatory reason for its conduct.'" *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (citation omitted).

The district court found that Quiroga utterly failed to establish the third *Jalil* factor, namely causation, and therefor concluded it was unnecessary for the court to reach the second *Jalil* factor, that is whether Quiroga was in fact discharged by Hasbro. Quiroga challenges this conclusion. His argument is essentially that "the timing [of his discharge] would raise an inference of retaliation." (Appellant's Brief at 21) As a matter of fact it cannot. In *Jalil* the employee was

discharged two days after filing his Equal Employment Opportunity Commission ("EEOC") complaint. While we held there that the "timing of the discharge in relation to Jalil's EEOC complaint may suggest discriminatory motives," *Jalil*, 873 F.2d at 709, we stopped short of creating an inference based upon timing alone.

The district court specifically found that Hasbro's decision to dismiss Quiroga (or accept his resignation) was not caused by Quiroga's claims of discrimination or threats to sue. The district court found that Hasbro considered Quiroga to be an important and valued member of their management team. Indeed, Hasbro considered Quiroga's Hispanic origin and Spanish language ability an asset in light of the heavily Hispanic work force at the Wayne, New Jersey plant. When Quiroga's attorney voiced complaints of discrimination in the letter to Hasbro, Hasbro did not retaliate against Quiroga. Rather, the company (1) investigated the claims made in the attorney's letter; (2) attempted unsuccessfully to discuss Quiroga's concerns with him; (3) instructed Hasbro's personnel department to tell Quiroga Hasbro understood his wish to leave, but that the company wanted to resolve the problems and keep him employed; and (4) met with Quiroga and Attorney Mills. Yet, at that very meeting Mills and Quiroga slammed the door and made plain what they said in their letter – that Quiroga would not continue with the company. The district court found that the use of the expression "outplacement arrangement," both in the letter and at the meeting, could only be interpreted as meaning that Quiroga was departing from Hasbro. App. 402.

Following the meeting, Hasbro's management decided it was in the company's best interest to respect Quiroga's desire to quit. Hasbro concluded that any person holding the important position of plant manager should, unlike Quiroga, be willing to remain long-term.

The district court found that Quiroga failed to establish his claims, and his action was "utterly without basis in law or in fact." App. 409. The district court determined that Quiroga's losses of his stock options and ultimately his job were the result of Attorney Mills' "outlandish" letter and not in retaliation for anything. App. 407.

We hold that the court's findings are not erroneous. The district court had the unique opportunity to judge the credibility and demeanor of Quiroga and Hasbro's witnesses. It chose to credit Hasbro's account of why the company acted as it did. It took Quiroga's statements in the letter and the meeting at face value. Additionally, Quiroga presented only his subjective belief, but absolutely no supporting evidence that Hasbro's motives were improper. Hence, Quiroga simply has no basis to challenge the district court's finding on causation. Accordingly, the belated assignments of error on appeal are without merit.

II.

APPEAL NO. 90-5478: ATTORNEYS' FEE AWARD.

A.

Hasbro filed a post-verdict motion for attorneys' fees under Section 706(k) of Title VII. The motion was supported by an affidavit of William F. Joy, Jr., a partner in the law firm of Morgan, Brown

and Joy, counsel for Hasbro in this matter. Attorney Joy's firm sought compensation in the total amount of $125,393.32 for 904 hours of attorney and paralegal time, as well as disbursements. The district court heard arguments on the motion but deferred its ruling and instead ordered that Quiroga provide certain financial information in answers to interrogatories submitted by Hasbro. After Hasbro completed discovery and the court heard arguments, it awarded Hasbro the sum of $10,000 in attorneys' fees under Section 706(k) of Title VII.

Title VII, § 706(k) provides as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs, ...

42 U.S.C. § 2000(e)-5(k).

The standard used to determine whether a request for attorneys' fees by a prevailing defendant should be approved is stated in *Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 421 (1978):

> A district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

Furthermore, the district court must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation."

Christiansburg, 434 U.S. at 421. We must defer to the district court's fee determination unless it has erred legally, *see Hughes v. Repko*, 578 F.2d 483, 486 (3d Cir. 1978), *holding modified, Inmates of Allegheny County Jail v. Pierce*, 716 F.2d 177 (3d Cir. 1983), or the facts on which the determination rests are clearly erroneous, *see Baker Indus., Inc. v. Cerberus, Ltd.*, 764 F.2d 204, 209-10 (3d Cir. 1985).

Under the *Christiansburg* standard, Hasbro is entitled to be awarded attorneys' fees only if Quiroga's action was frivolous, unreasonable, or without foundation. *Christiansburg*, 434 U.S. at 421. *Christiansburg* qualified those terms by equating "meritless" with "groundless" or "without foundation," and did not "impl[y] that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him." *Christiansburg*, 434 U.S. at 421-22. Hence, under *Christiansburg*, even if Quiroga's action was not brought in subjective bad faith, since Hasbro prevailed, it is entitled to attorney's fees upon a finding that the Quiroga's action was meritless, frivolous, unreasonable, or without foundation.

Quiroga's first argument on appeal is essentially that his claim had legal foundation and was not frivolous, and that the district court's factfindings to the contrary are clearly erroneous. The district court found not only that Quiroga's claims were without foundation or groundless, but also that his attorney "tried to force plaintiff's various grievances into the framework of various state and federal causes of action." App. 408. The court found that the "national origin" basis of Quiroga's cause of action "appears to have been an attorney

construct." App. 408. The district court found Quiroga's claims to be "utterly without basis." App. 409. The district court concluded "[i]t was just a baseless case, the kind which should not be brought, and therefore [if] Mr. Quiroga can afford attorney's fees he should pay them." Supp. App. 65-66. These findings of the court are not clearly erroneous and, therefore, provide a basis for the Title VII attorney fee award.

Quiroga's second argument is that our decision in No. 90-5284 is irrelevant to our decision in No. 90-5748 because "Hasbro cannot establish, on the record before the District Court, any evidence establishing bad faith and/or frivolity by Quiroga either at the time this action was filed or during the period from the filing of the complaint until trial." Appellant's Brief at 11. Quiroga relies upon our decisions in *Ford v. Temple University*, 790 F.2d 342 (3d Cir. 1986) (Attorneys' fees may be assessed against plaintiff's attorney under an exception to the general rule that each party to a lawsuit bear its own attorney's fees or 28 U.S.C. § 1927 only upon a finding of willful bad faith on the part of the offending attorney) and *Williams v. Giant Eagle Markets*, 883 F.2d 1184, 1190 (3d Cir. 1989) (Attorneys' fees may not be assessed against a party under 28 U.S.C. § 1927). But these cases do not control because the district court awarded fees under Title VII. As Quiroga's own brief (page 8) acknowledges, Hasbro need not establish bad faith to win fees under Title VII. *Christiansburg* authorizes an award of attorney's fees to Hasbro in this Title VII case upon a finding that Quiroga's action was frivolous, unreasonable, or without foundation.

Appendix A

The Court in *Christiansburg* did not quantify the evidence an unsuccessful plaintiff must produce to escape an adverse award of fees. There is no need for more precise line-drawing in this case. The district court found not only that Quiroga's claims were "utterly without basis in law or in fact," but that preliminary investigation would have shown this to Quiroga and his attorney as they prepared their action. App. 409. The district court also found that Quiroga's discrimination claim "appears to [be] an attorney construct." App. 408. These findings are more than sufficient to justify the award of fees to Hasbro.

It is clear from *Christiansburg* that attorney's fees are not routine, but are to be only sparingly awarded. Nevertheless, here the same judge who presided over all proceedings also determined the fee award. Thus, that judge was "particularly well qualified to make the partially subjective findings necessary for [an] award of attorney's fees." *P. Mastrippolito & Sons, Inc. v. Joseph*, 692 F.2d 1384, 1387 (3d Cir. 1982). Because the district court offered compelling reasons to conclude Quiroga's action was frivolous, and to substantiate its decision on fees, we will affirm.

B.

In accordance with Hasbro's motion, the district court assessed fees against only the plaintiff Quiroga. We believe that, notwithstanding the limitations of Hasbro's motion, the district court should consider whether the fees should also be levied against Quiroga's attorney.

We believe that in light of the district court's findings in this case, the filing of Quiroga's complaint without any foundation in law or fact

was as much Attorney Mills' fault as it was Quiroga's. Mills, as a trained lawyer, should have known better. He proceeded with an obviously frivolous lawsuit, after having put his client's job and future at great risk, and also subjected the parties and the court to unnecessary expense and inconvenience.

Title VII gives the district court considerable discretion to award fees, *see* 42 U.S.C. § 2000e-5(k), but the statute is silent as to who shall pay the fees. Nevertheless, we have said the statute does not authorize assessment of fees against the loser's attorney. *Brown v. Borough of Chambersburg*, 903 F.2d 274, 276-277 & n.1 (3d Cir. 1990) (while noting that the standards for assessing attorney's fees are identical under § 1988 and 42 U.S.C. § 2000e-5(k), "we conclud[ed] that § 1988 does not authorize the award of attorneys' fees against plaintiff's attorney"). *See also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 n.9 (1980).

Although the district court may not assess attorney's fees against Mills under Title VII, it may consider "alternative theories of liability." *Hamer v. Lake County*, 819 F.2d 1362, 1370 (7th Cir. 1987). These alternatives include Fed. R. Civ. P. 11 and the court's "inherent power" to sanction an attorney who acts "'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Hamer*, 819 F.2d at 1370, n.15 (*quoting F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974)) (other citations omitted). *Accord Roadway Express*, 447 U.S. at 766-768 (court remanded for a determination whether the *Alyeska Pipeline* "bad faith exception" warranted attorney's fees against counsel); *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 918-919

(11th Cir. 1982) (court held that 42 U.S.C. § 2000e-5(k) of Title VII of the Civil Rights Act of 1964 did not authorize fees against counsel but remanded to the district court to consider sanctions under its inherent power). *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387 (7th Cir. 1983) ("[The] power to punish 'counsel who wilfully abused judicial processes' [was] recently recognized as inherent in a court's power to protect the orderly administration of justice.", citing *Roadway Express Inc. v. Piper*, 447 U.S. at 766).

Fed. R. Civ. P. 11, for example, permits "[c]omplete or partial fee shifting [as] ... one form of disciplinary action which a court may invoke in appropriate circumstances." *Galardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987). In a situation where a complaint is signed and filed without a reasonable inquiry by the signers that it is well grounded in fact and is warranted by existing law, Rule 11 provides in pertinent part that the court upon motion "or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party ... the amount of the reasonable expenses incurred because of the filing of the pleading .... including a reasonable attorney's fee."

Acting on the basis of this rule, the court of appeals in *Eastway Construction Corp. v. City of New York*, 821 F.2d 121 (2d Cir. 1987), (*Eastway II*) decided in the exercise of its appellate authority

under 28 U.S.C. § 2106 (1982)[1] to allocate the payment of an attorney's fee between counsel and his client without even remanding to the district court. In the interest of judicial economy and the authority contained in 28 U.S.C. § 2106 that court of appeals held:

> Having examined the parties' contentions, the prior proceedings, and the observations of the District Judge, we have concluded that one half of the fee award should be imposed jointly and severally upon the plaintiffs and one half should be imposed upon plaintiffs' counsel.

Eastway II, 821 F.2d at 124. Similarly, in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975) *superseded* by 42 U.S.C. § 1988 (1976), the Supreme Court said that, apart from Rule 11, a court has inherent power, even under the restrictive "American rule," to allow attorneys' fees against an attorney in particular situations, unless forbidden by Congress. *Alyeska*, 421 U.S. at 259. *See also* 28 U.S.C. § 1927.

Hence, it is well-established that courts have the power to impose sanctions on both litigants and attorneys to regulate their docket, to promote judicial efficiency, and to deter abuse of judicial process. *See Roadway Express*, 447 U.S. at 764-67. In *Roadway Express*, the Court held that, apart from section 1927, federal courts have the inherent power to award attorney's fees against counsel personally when the court has found that

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1. 28 U.S.C. § 2106 provides in pertinent part: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify ... or direct the entry of such appropriate judgment ... as may be just under the circumstances."

the attorney acted in bad faith. "Bad faith is a factual determination reviewable under the clearly erroneous standard. Once a finding of bad faith has been made, the appropriateness of sanctions is a matter entrusted to the discretion of the district court." *Hackman v. Valley Fair*, Nos. 90-5916, 91-5190, slip op. at 7 (3d Cir. filed May 1991) (This is a section 1927 case).

The court in *Roadway Express* did not uphold the trial court's award of attorneys's fees because the trial court did not make a specific finding that counsel's conduct "constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers." *Roadway*, 447 U.S. at 767. Since the district court here did not make a finding as to whether Mills or Quiroga acted in bad faith, we will remand to the trial court to make that determination in the first instance, and to decide whether attorneys' fees should be imposed as a sanction against Quiroga's counsel on any of the above-discussed grounds.[2]

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2. On September 12, 1980, and after the Supreme Court decided *Roadway*, Congress amended section 1927. *See* the Antitrust Procedural Improvements Act of 1980, pub. l. No. 96-349 § 3, 94 Stat. 1154, 1156 (September 12, 1980) Therein, Congress amended section 1927 to expressly provide that any attorney who so multiplies proceedings "unreasonably and vexatious may be required by the court *to satisfy personally* the excess costs, expenses, and *attorneys fees* reasonably incurred because of such conduct." 28 U.S.C. § 1927 (emphasis added). The legislative history of this section makes it clear that the September 12, 1980 amendment was intended to "expand [ ] the category of expenses the judges might require and attorney to satisfy personally to include ... attorneys fees." Joint Explanatory Statement of the Committee of Conference, 96th Cong. 2d Sess. 8, reprinted in 1980 U.S. Code Cong. & Ad. News 2781, 2782; *see also Lewis v. Brown and Root, Inc.*, 711 F.2d 1287,

III.

We will affirm the orders of the district court in appeal No. 90-5284. Although we approve the award of attorney's fees in appeal No. 90-5748, we will remand to the district court with direction to reconsider whether its award should be levied solely upon the plaintiff, under authority of the Civil Rights Statute, 42 U.S.C. § 2000e-5(k) or also upon his attorney under alternative theories of liability.[3]

1289, 1292 (5th Cir. 1983) (upholding an award of attorneys fees under section 1927 against plaintiff and his attorney jointly and severally), *cert. denied*, – U.S. –, 104 S.Ct. 975 (1984), *modified*, 722 F.2d 209 (per curiam) (remanding for trial court to determine whether attorneys' fees for entire proceeding or just a portion of it should be awarded), *cert. denied*, – U.S. –, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984).

3. The district court may consider whether Attorney Mills will have a conflict of interest if he continues to represent Quiroga in the proceedings on remand.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 13, 1991

Filed February 13, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-5284 and 90-5748

ALVARO QUIROGA,
Appellant

V.

HASBRO, INC. and PLAYSKOOL BABY, INC.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF NEW JERSEY
(D.C. Civil Action No. 89-01187)

Submitted Under Third Circuit Rule 12(6)
On August 31, 1990

Before: HUTCHINSON, NYGAARD and
ROSENN, *Circuit Judges*

(Opinion Filed February 13, 1991)

STEPHEN R. MILLS, ESQUIRE
554 South Livingston Avenue
Livingston, NJ 07039
Attorney for Appellant

Appendix B

JAMES M. PAULSON, ESQUIRE
Morgan, Brown & Joy
One Boston Place
Boston, MA 02108
Attorney for Appellees

OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

In the case underlying these consolidated appeals, Alvaro Quiroga instituted an action against Hasbro and its subsidiary, Playskool Baby, Inc. (collectively, "Hasbro") alleging violations of Title VII, 42 U.S.C. §§ 2000e-2000e-17, the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5, *et seq.*, the Age Discrimination In Employment Act 29 U.S.C. §§ 621-634, and state claims of breach of contract and intentional infliction of emotional distress. Just before trial, the district court granted summary judgment for defendants on all claims except the Title VII and comparable NJLAD claims. In those claims Quiroga, a vice-president of Hasbro, alleged he was wrongfully denied stock options in 1988, and was discharged in retaliation for asserting his rights. Following trial on these remaining claims, the district court entered judgment in favor of Hasbro. Upon post-trial motion by Hasbro, the district court ordered Quiroga to pay Hasbro's attorney fees in the amount of $10,000 under Section 706(k) of Title VII. 42 U.S.C. § 2000e-5(k).

Quiroga claims on appeal in No. 90-5284, the underlying case, that the district court's trial findings are clearly erroneous and that the district

court ignored issues of material fact in its summary judgment. In appeal No. 90-5748, Quiroga claims the district court abused its discretion by awarding Hasbro attorneys fees. We will affirm the orders of the district court in appeal No. 90-5283 and for the reasons following we will remand in appeal No. 90-5748. The case is quite simple and ordinarily we would not write except it is necessary here to explain our decision on appellant's challenge to the district court's attorney fee award.

I.

APPEAL NO. 90-5284

A. SUMMARY JUDGMENT.

The district court granted summary judgment on many of Quiroga's claims, including a claim that Hasbro's Personal Policies Manual ("manual") provided him rights that Hasbro violated when it discharged him. Quiroga challenges only that portion of the summary judgment. He contends that whether the manual applies to him is an unresolved and material question of fact precluding summary judgment, and that the district court misapplied New Jersey law regarding contractual provisions contained in company policies when it dismissed his claim for breach of contract. Our review of a summary judgment is plenary.

Quiroga's contention is without any support in the record because he cannot show that, as a vice-president and plant manager, the manual applies to him. First, the affidavit of William Daly, Hasbro's vice president in charge of industrial relations states that the guide is intended for use

by supervisors and managers to assist them in managing personnel matters of the rank and file employees and does not create rights for supervisors or managers. App. 487. He also stated that unless a specific written employment contract is in place, managers are employed at will. App. 488. There is nothing in the record to dispute that evidence.

Quiroga says only that he was not informed that the manual did not apply to him. Quiroga Affidavit App. 460. This does not create a dispute of fact. The affidavit of William Daly has carried Hasbro's burden under Rule of Civil Procedure 56. Quiroga must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Quiroga must set forth specific facts showing a genuine issue for trial and may not rest upon mere allegations, general denials, or such vague statements that he was never informed that the manual did not apply to him. He must offer some evidence that the manual does indeed apply to him. *Soundship Building Company v. Bethlehem Steel*, 533 F.2d 96, 99 (3d Cir. 1976), *cert. denied*, 429 U.S. 860 (1976). Finally, the court in *Matsushita* stated with respect to evaluating evidence on a summary judgment, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted). Thus, although evidence must be viewed in the light most favorable to the party opposing the motion, *Wahl v. Rexnord, Inc.*, 624 F.2d 1169, 1181 (3d Cir. 1980), Quiroga has simply offered no evidence to

so view. Since Quiroga can neither show that the manual applies to him nor that it creates contractual rights for him, we need not consider his contention that the district court misapplied New Jersey contract law. We find Quiroga's objection to the summary judgment to be without merit.

B. TRIAL FACTS.

Following a bench trial on the remaining claims the district court found the following facts which are germane to its decision and our review. Quiroga was a valued employee of Hasbro and its corporate predecessors from 1974 until he parted company with them in May, 1988. He was vice president of operations in Hasbro's Wayne, New Jersey plant and Hasbro's second highest ranking employee in New Jersey.

Quiroga received a stock option award in 1986. In 1987 he committed the Wayne plant to production far beyond the company's manufacturing plan. As a result of the over-production, Hasbro sustained losses and seriously considered closing the plant. It did not close the plant, but as a consequence of the overproduction, management did not recommend Quiroga for a stock option award for 1987. Early in 1988 Quiroga learned he would not receive the award and complained to his superiors. Because Hasbro considered Quiroga to be a key person, in April 1988 management reconsidered and added his name to the list of those recommended for stock option awards.

During 1987 rumblings began between Quiroga and Hasbro's management. Quiroga found himself in disagreement with management decisions;

namely, he was disappointed with their decision not to pursue plans to relocate the New Jersey plant to South Carolina. Quiroga was to become manager of the new plant, and viewed Hasbro's decision to scuttle the plan as a failure to promote him. He was affronted by Hasbro's allocation of responsibilities from him to others. He also incorrectly believed he was to be denied a stock option award, so early in 1988 he hired an attorney. What happened thereafter cost Quiroga his stock options and his job.

Quiroga's attorney, Stephen R. Mills, wrote a letter to Hasbro that the district court found to be "heavy handed" and "extraordinary and outlandish" in which Attorney Mills claimed that Quiroga had been "constructively discharged" and suggested a meeting to explore "specific proposals for an outplacement arrangement" for Quiroga and a possible "settlement of Mr. Quiroga's claims." App. 401. The district court found the letter to be Quiroga's announcement that he was "departing from the company." App. 402.

Nevertheless, and in spite of Attorney Mills' letter, "Hasbro was anxious to retain [Quiroga] in its employ as he was still considered to be an important executive." App. 402. Quiroga, Mills and representatives of Hasbro all met in response to the suggestion in Attorney Mills' letter. At the meeting, Mills stated that Hasbro had breached its contract with plaintiff and he issued a seven-point ultimatum to Hasbro. App. 403.

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2. Quiroga's package would be $112,000, excluding the company automobile.

3. Quiroga would agree to a release, waiving any claims against Hasbro.

4. Quiroga would seek 3-1/2 years of salary and benefits, totalling $392,000 plus $50,000 in lost options. No attorney's fees would be sought.

5. Quiroga would act as a consultant at half his annual salary, if desired by Hasbro.

6. Hasbro would continue Quiroga's health, dental and life insurance benefits for 18 months.

7. Quiroga would make a statement to all employees.

App. 607.

Because of the ultimatum issued by his counsel, Quiroga's name was removed from the list of those to receive the stock option. Options were reserved for employees who intended to stay, and also to reward and encourage employees to stay with the company. App. 404. Hasbro further informed Quiroga that it accepted his "wishes to resign." App. 407.

C. RETALIATORY DISCHARGE.

Quiroga contends that Hasbro's actions amounted to a retaliatory discharge. In order to recover on his retaliatory discharge claims, Quiroga must show that, (1) he engaged in a protected activity; (2) he was discharged after or contemporaneous with the activity; and (3) a causal link existed between the protected activity and threats to sue, and the loss of his job. *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989), *cert. denied* 110 S.Ct. 725 (1990).

If Quiroga makes a prima facie case showing all three *Jalil* factors, then the burden "shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its conduct." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

The district court found that Quiroga utterly failed to establish the third *Jalil* factor of his retaliation claim, namely causation, and concluded it was unnecessary for it to determine the second *Jalil* factor, whether Quiroga was in fact discharged by Hasbro. Quiroga challenges this conclusion. His argument is essentially *post hoc ergo propter hoc*: that "the timing [of his discharge] would raise an inference of retaliation." (Appellant's Brief T-21) It does not.

In *Jalil* the employee was discharged two days after filing his Equal Employment Opportunity Commission ("EEOC") complaint. There we held that the "timing of the discharge in relation to Jalil's EEOC complaint may suggest discriminatory motives." *Jalil*, 873 F.2d at 709. But we stopped short of creating an inference based upon timing alone with nothing more.

Quiroga can point to nothing more. Indeed, the court found otherwise. The district court specifically found that Hasbro's decision to dismiss Quiroga (or accept his resignation) "was not caused by Quiroga's claims of discrimination or threats to sue." App. 409. The district court found that Hasbro considered Quiroga to be an important and valued member of their management team. App. 23, 32, 35, 46, 59-60, 335, 336-37, 407. That he is of Hispanic origin and speaks Spanish was in fact an asset with the heavily Hispanic work force in the Wayne, New Jersey plant. App. 335,

407. When his attorney voiced complaints of discrimination in the letter to Hasbro, Hasbro did not retaliate against Quiroga. Rather, the company (1) investigated the claims made in the attorney's letter, App. 334, 336-37, 402; (2) attempted unsuccessfully to discuss Quiroga's concerns with him, App. 336-38, 402; (3) instructed their personnel department to tell Quiroga they understood his wish to leave, but that the company wanted to resolve the problems and keep him in their employ, App. 402; and (4) met with Quiroga and Attorney Mills, App. 403. Yet, at that very meeting Mills and Quiroga slammed the door shut and made plain what they said in their letter – that Quiroga would not continue with the company. App. 339-41, 403. The district court found that the use of the expression "outplacement management," both in the letter and at the meeting, could only be interpreted that Quiroga was resigning from Hasbro. App. 402.

Following this meeting, Hasbro's management concluded that it was in the company's best interest to respect Quiroga's desire to quit. Hasbro concluded that any person holding the important position of plant manager should, unlike Quiroga, be willing to remain there on a long-term basis.

The district court found that Quiroga "utterly fail[ed] to establish his claims," App. 407, and his action was utterly without basis in law or in fact, App. 409. The district court determined that Quiroga's losses of both his stock option and ultimately his job were the result of Attorney Mills' "outlandish" letter and not in retaliation for anything.

We conclude that the court's findings are not erroneous. The district court had the unique

opportunity to judge the credibility and demeanor of Quiroga and Hasbro's witnesses. It chose to credit Hasbro's account of why the company acted as it did. It took Quiroga's statements in the letter and the meeting at face value. Additionally, Quiroga presented only his subjective belief, but absolutely no supporting evidence that Hasbro's motivation was improper. Hence Quiroga simply has no basis to challenge the district court's finding on causation. The assignments of error on appeal are without merit.

II.

APPEAL NO. 90-5478: ATTORNEY FEE AWARD.

A.

Hasbro filed a post-verdict motion for attorney fees under Section 706(k) of Title VII. The motion was supported by an affidavit of William F. Joy, Jr., a partner in the law firm of Morgan, Brown and Joy, counsel for Hasbro in this matter. Attorney Joy's firm sought compensation in the total amount of $125,393.32 for 904 hours of attorney and paralegal time, as well as disbursements. The district court heard arguments on the motion but deferred ruling and ordered instead that Quiroga provide certain financial information in answers to interrogatories submitted to him by Hasbro. After Hasbro completed discovery, the court heard arguments by counsel and awarded Hasbro the sum of $10,000 in attorneys' fees under Section 706(k) of Title VII.

Title VII, § 706(k) provides as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow

> the prevailing party ... a reasonable attorney's fee as part of the costs, ...

42 U.S.C. § 2000(e)-5(k).

The standard used to determine whether a request for attorneys' fees by a prevailing defendant should be approved is stated in *Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 421 (1978):

> A district court may in its discretion award attorneys' fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

Further, the district court must not engage in hindsight logic, and must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421. We will defer to the district court's conclusion unless it has abused its discretion and to its facts unless we find them to be clearly erroneous. *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978).

Under the *Christiansburg* standard, Hasbro is entitled to be awarded attorney's fees only if Quiroga's action was frivolous, unreasonable, or without foundation. *Christiansburg*, 434 U.S. at 421. *Christiansburg* qualified those terms by equating "meritless" with "groundless" or "without foundation," and did not "imply that the plaintiff's objective bad faith is a necessary prerequisite to

a fee award against him." *Christiansburg*, 434 U.S. at 421-22. Hence, under *Christiansburg*, even if Hasbro's action was not brought in subjective bad faith, since Hasbro prevailed in this Title VII case, it is entitled to attorney's fees upon a finding that the plaintiff's action was meritless, frivolous, unreasonable, or without foundation.

Quiroga's first argument on appeal is essentially that his claim was upon proper foundation and not frivolous, and the district court's factfindings to the contrary are clearly erroneous. The district court found not only that Quiroga's claims were without foundation or groundless, but found that his attorney "tried to force plaintiff's various grievances into the framework of various state and federal causes of action." App. 408. The court found that the "national origin" basis of Quiroga's cause of action "appears to have been an attorney construct." App. 408. The district court found Quiroga's claims to be "utterly without basis." App. 409. The district court concluded "it was just a baseless case, the kind which should not be brought, and therefore [if] Mr. Quiroga can afford attorney's fees he should pay them." Supp. App. 66. The findings of the court are not erroneous and its conclusion, supported by the facts, provides a basis for the Title VII attorney fee award.

Quiroga's second argument is that our decision in No. 90-5284 is irrelevant to our decision in No. 90-5748 because "Hasbro cannot establish, on the record before the district court, any evidence establishing bad faith and/or frivolity by Quiroga either at the time this action was filed or during the period from the filing of the complaint until trial." Appellant's Brief p. 11.

Quiroga relies upon our decisions in *Ford v. Temple University*, 790 F.2d 342 (3d Cir. 1986) (Attorney fees may be assessed against plaintiff's attorney under an exception to the general rule that each party to a lawsuit bear its own attorney's fees or 28 U.S.C. § 1927 only upon a finding of willful bad faith on the part of the offending attorney) and *Williams v. Giant Eagle Markets*, 833 F.2d 1183 (3d Cir. 1989) (Attorney fees may not be assessed against a party under 28 U.S.C. § 1927). These cases do not control where, as here, the district court awards fees under Title VII.

Under Title VII, Hasbro need not establish bad faith as Quiroga's own brief acknowledges. Appellant's Brief at 8. *Christiansburg* authorizes an award of attorney's fees to Hasbro in this Title VII case upon a finding that Quiroga's action was frivolous, unreasonable, or without foundation. The Court in *Christiansburg* did not quantify the evidence an unsuccessful plaintiff must produce to escape this exposure. Nor is there any need here for any formal line-drawing. The district court found not only that Quiroga's claims were "utterly without basis in law or in fact," but that investigation of the claim should have shown this to Quiroga and his attorney when they began to prepare this action, App. 409, and that Quiroga's claim that Hasbro discriminated against him because he is of Hispanic origin "appears to [be] an attorney construct." App. 408. This is sufficient.

It is clear from *Christiansburg* that attorney's fees are not routine, but are to be only sparingly awarded. Nevertheless, here the same judge who presided over all proceedings also determined the fee award. He was thus "particularly well-qualified to make the partially subjective findings necessary

for an award of fees." *P. Mastrippolito & Sons, Inc. v. Joseph*, 692 F.2d 1384, 1387 (3d Cir. 1982). The district court offered compelling reasons to conclude that Quiroga's action was frivolous and to substantiate its judgments and its decision on fees.[1] The findings of the district court are not erroneous and the fee award was within its discretion. We will affirm.

B.

In accordance with Hasbro's motion, the district court assessed the fees against only the plaintiff Quiroga. We believe that, notwithstanding the limitations of the motion, the district court should consider whether the fees should be levied against Quiroga, his counsel, Steven R. Mills, or both.

Quiroga, who held a very responsible executive position with Hasbro for a number of years, contended that he suffered a retaliatory discharge by Hasbro for asserting rights to certain stock options in the company to which he claimed he was entitled. The record in this case, however, demonstrates that Quiroga lost his job not because of any retaliatory conduct on the part of his employer, but because of his and his lawyer's intractable and non-judgmental conduct. Having made the mistake of jointly causing the plaintiff's

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1. Quiroga is likewise wrong that the record does not establish bad faith. The record fully supports a finding that Quiroga, his attorney, or both, prepared and continued this action in bad faith. But since Hasbro requested fees only under Title VII, not 28 U.S.C. § 1927, and only against Quiroga and not his attorney, it was unnecessary for the district judge to make such a finding.

termination, they followed it by a lawsuit without factual or legal foundation.

The district court found that Quiroga utterly failed to establish his claims, that they were completely without any basis in law or in fact, and we agree. The district court went further, however, and determined that the plaintiff's losses of his stock options and his job were the result of Attorney Mills' "outlandish" letter. We concluded that these findings are not clearly erroneous.

In light of these findings, we believe that filing the underlying action without any foundation in law or fact was as much, if not more so, the fault of counsel as it was of his client. Counsel, as a trained lawyer, should have known better. He proceeded with an obviously frivolous lawsuit, after having put his client's job and future at great risk, and subjected the parties and the court to unnecessary expense and inconvenience.

Title VII provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commissioner or the United States, a reasonable attorney's fee as part of the costs and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k). This section of the Act places considerable discretion in the district court and permits the assessment of a reasonable attorney's fee as part of the costs in favor of the prevailing party. The statute is silent as to who shall pay the attorney's fee; it does not, however preclude counsel for plaintiff paying all or part of it. The Supreme Court in *Christiansburg* held that

the statute does permit the shifting of fees in favor of the defendant as well as the plaintiff in an appropriate situation.

In the face of the findings of fact made by the district court in this case, it cannot be gainsaid that the plaintiff's action was, at the least, unreasonable and without foundation. The court in *Christiansburg* did not decide the question of whether fees may also be assessed against counsel for the plaintiff.

Rule 11 of the Federal Rules of Civil Procedure, however, like the Civil Rights statute above, also provides for fee shifting in appropriate situations. In a situation where a complaint is signed and filed without a reasonable inquiry by the signers that it is well grounded in fact and is warranted by existing law, it provides in pertinent part that the court upon motion "or upon its own initiative," shall impose "upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party ... the amount of reasonable expenses incurred because of the filing of the pleading ..., including a reasonable attorney's fee." Acting on the basis of this rule, the court of appeals in *Eastway Construction Corp. v. City of New York*, 821 F.2d 121 (2d Cir. 1987), (*Eastway II*) concluded in the exercise of its appellate authority under 28 U.S.C. § 2106 (1982)[2] to allocate the

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2. 28 U.S.C. § 2106 provides in pertinent part: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify ... or direct the entry of such appropriate judgment ... as may be just under the circumstances."

payment of an attorney's fee between counsel and his client without even remanding to the district court. In the interest of judicial economy and the authority contained in 28 U.S.C. § 2106 it held:

> Having reexamined the parties' contentions, the prior proceedings, and the observations of the district judge, we have concluded that one-half of the fee award should be imposed jointly and severally upon the plaintiffs and one-half should be imposed upon plaintiff's counsel.

Id. at 124. In addition, there is the observation by the Court in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1974), made independently of Rule 11. Although the Court denied fees to the plaintiff under the facts of that case, it stated that there is inherent power in the court even under the restrictive "American rule" to allow attorney's fees in particular situations, unless forbidden by Congress. *Id.* at 259.

In the context of Rule of Appellate Procedure 38, we have held that damages may be imposed against appellant's counsel because "attorneys have an affirmative obligation to research the law and to determine if a claim on appeal is utterly without merit and may be deemed frivolous. We conclude that if counsel ignore or fail in this obligation to their client, they do so at their peril and may become personally liable to satisfy a Rule 38 award." *Hilmon v. Hyatt*, 899 F.2d 250, 254 (3d Cir. 1990). The test we enunciated there was whether following a thorough analysis of the record and careful research of the law a reasonable attorney would conclude that the action was

frivolous. We see no reason to apply a different standard in the context of Title VII attorney's fees.

Under the facts and circumstances of this case, there is ample authority for the trial judge to award counsel fees to the prevailing defendant to be paid by the plaintiff, his counsel, or both. We are generally reluctant to interfere with the course of litigation charted by an attorney for a client. Nonetheless, we believe that the barest rudiments of justice suggest that here, where counsel played the major role in not only bringing this action, but in bringing about his client's loss, it will be manifestly unjust that counsel escape the consequences of his own ineptness and conduct while his client is ordered to pay.

III.

We will affirm the orders of the district court in appeal No. 90-5284. Although we approve the award of attorney's fees in appeal No. 90-5748, we will remand to the district court with direction to reconsider whether its award should be levied upon the plaintiff, upon his counsel, or both jointly, either under the authority of the Civil Rights Statute, 42 U.S.C. § 2002-5(k) or Rule 11, or both.[3]

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3. The district court may consider whether Attorney Mills will have a conflict of interest if he continues to represent Quiroga in the proceedings on remand.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 26, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-5284 and 90-5748

ALVARO QUIROGA,

Appellant

V.

HASBRO, INC. and PLAYSKOOL BABY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil Action No. 89-01187

Submitted Under Third Circuit Rule 12(6)
On August 31, 1990

SUR PETITION FOR REHEARING

Present: HUTCHINSON, NYGARRD and ROSENN,
Circuit Judges.

After reconsideration of the petition for rehearing, it is

ORDERED that the opinion of this court entered February 13, 1991 and the judgment entered thereon are vacated, and the petition for in banc consideration suspended. The matter will be relisted for submission before the panel.

Appendix C

By the Court,

s/ Rosenn
Circuit Judge

DATED: MAR 26 1991

APPENDIX D — EXHIBIT P-6 - LETTER DATED APRIL 5, 1988 TO EDWARD JAFFY FROM STEPHEN R. MILLS, ESQ.

LAW OFFICES

STEPHEN R. MILLS
75 LIVINGSTON AVENUE
ROSELAND, NEW JERSEY 07068
(201) 535-9098

MEMBER OF NJ AND NY BARS

April 5, 1988

CONFIDENTIAL

Mr. Edward Jaffy
Playskool Baby, Inc.
108 Fairway Court
Northvale, New Jersey 07647

Re: Al Quiroga

Dear Mr. Jaffy:

I have been retained by Mr. Al Quiroga who is currently Vice President, Operations, at Playskool Baby. Mr. Quiroga, as you well know, has been involved in the manufacturing and operations functions of your business and its predecessors for almost twenty years. I write to you on Mr. Quiroga's behalf to bring to your attention his well-founded beliefs that he has been the victim of unlawful discrimination, the subject of harassment in the terms and conditions of his employment, and has been damaged by the breach of certain oral representations made to him in 1986.

Appendix D

Mr. Quiroga's contributions to Playskool Baby and predecessor entities are well known to you and the management of your parent company, Hasbro, Inc. Mr. Quiroga relocated from California to New Jersey in 1980 based upon your specific oral representation to him that "as long as I am here you'll be safe." It was in recognition of his excellent service that, in the last week of July, 1986, you and Mr. Hugh Maxwell, Senior Vice President of Operations of Hasbro, met with Mr. Quiroga and advised him that Hasbro and Playskool Baby intended to relocate its New Jersey operations to South Carolina and that he, Mr. Quiroga, would be "El Presidente." Based upon this explicit representation to Mr. Quiroga, which was also communicated to Mr. Rodney Armstrong, Mr. Quiroga expended substantial capital in purchasing land and building a house in the State of Florida to utilize on weekends.

To say the least, Mr. Quiroga was shocked and depressed to discover that, in actuality, Hasbro and Playskool Baby were not planning to move to South Carolina but, instead, decided to expand their existing plant in Lancaster, Pennsylvania. Mr. Quiroga believes that the promise concerning his relocation to South Carolina was made in bad faith since plans were being made to expand the Pennsylvania operation instead. Subsequent to that time, as you doubtless recall, Mr. Quiroga met with you and Mr. Maxwell on various occasions to discuss his future with Playskool Baby. Notwithstanding his extensive experience in the industry and his substantial contributions to both companies, Mr. Quiroga was informed on several occasions that it was highly unlikely that he would be able to retain his high level position if he were ever moved to Rhode Island. At the same time, if you will recall, a decision had been made in a preliminary fashion to close the Wayne, New Jersey plant which Mr. Quiroga headed. Despite

the devastating effect that the various rumors concerning the plant closure had on morale, Mr. Quiroga continued — and has continued — to provide loyal management to the operation in Wayne.

In addition to the breach of the promises discussed above, it is Mr. Quiroga's position — with which I concur — that he has also been treated unfairly in the terms and conditions of his employment since the preliminary decision was made to close the Wayne plant. Mr. Quiroga's involvement in managerial decisions has been cut back substantially. His 1988 raise was at an extremely low level. And, in addition, there was a decision made (later reversed) not to provide him with stock options comparable to those that he received in 1987. Although this decision was later reversed as a result of Mr. Quiroga's vociferous complaints, I believe that it highlights the type of unfair treatment to which he has been subjected for the last several years.

An examination of the Hasbro Personnel Manual — which is an enforceable contract under New Jersey law — discloses no provision that permits you to terminate Mr. Quiroga without cause. Rather, it only provides in circumstances such as these for terminations for cause only after complying with numerous preconditions such as counselings and warnings. Obviously, there is no cause or basis for terminating Mr. Quiroga under the Personnel Manual. At no time in his career has anyone suggested that his performance has been anything less than superb. Therefore, it is my opinion that you are seeking to circumvent the provisions of your own personnel manual, as well as the explicit oral representations made to Mr. Quiroga, by engaging in activities which are tantamount to a constructive discharge.

In addition to the above-discussed facts, I would also point

out to you in passing that Mr. Quiroga is of Hispanic origin and is thus subject to the protections of federal and state equal employment laws. Mr. Quiroga is, I believe, the highest ranking Hispanic in your companies and is unaware of any similarly situated non-Hispanic managerial employees being subject to the types of discriminatory conduct discussed above.

Mr. Quiroga has been a loyal and valuable employee of your company and its predecessor entities for almost twenty years. Although he is reluctant because of his personal loyalty to you to commence any administrative and or legal action against Playskool Baby and or Hasbro, he believes — and I agree — that he has clearly been the subject of discriminatory treatment, violations of your Personnel Manual, constructive discharge, and breach of specific oral representations to him which are enforceable under New Jersey law. Notwithstanding all of the above, Mr. Quiroga has instructed me to request that I meet with you and appropriate Hasbro representatives to explore a possible settlement of Mr. Quiroga's claims against Playskool Baby and Hasbro. At this meeting, I will be prepared to provide to you specific proposals for an outplacement arrangement for Mr. Quiroga that would obviate the necessity of any litigation between Mr. Quiroga, Playskool Baby, and Hasbro. If you desire any further information concerning this matter, please do not hesitate to contact me. I shall forebear from commencing any legal action and/or filing a Charge of Discrimination for a reasonable period of time in order to see if you are willing to explore resolving Mr. Quiroga's claims in an amicable manner.

Very truly yours,

s/ Stephen R. Mills
Stephen R. Mills

SRM:bas

APPENDIX E — EXHIBIT P-8 - LETTER DATED MAY 6, 1988 TO DONALD M. ROBBINS, ESQ. FROM STEPHEN R. MILLS, ESQ.

May 6, 1988

BY FACSIMILE

Donald M. Robbins Esquire
Vice President and General Counsel
HASBRO, Inc.
1017 Newport Avenue
Pawtucket, Rhode Island 12862

Re: Al Quiroga

Dear Don:

Thank you for your letter of May 2, 1988.

As an employment law practitioner of some experience, I was quite careful to set out in my April 5, 1988 letter an accurate summary of the state of the law in New Jersey. Therefore, I was surprised that your letter appeared to have inadvertently omitted what are the universally recognized and controlling New Jersey precedents on the issue in question herein. Mr. Quiroga has been informed on numerous occasions that the Hasbro Industries, Inc. "Corporate Personnel Policies Manual" applies to him. In *Woolley v. Hoffman LaRoche,* 99 N.J. 284 (1985), the New Jersey Supreme Court explicitly held that a personnel manual which does not contain an explicit disclaimer therein constitutes an enforceable contract between an employee and an employer. No disclaimer exists in the personnel policy manual applicable to Mr. Quiroga. Your right to terminate Mr. Quiroga, under New Jersey law, is thereby limited and you must comply with the termination for

cause provisions contained in your manual.

The *Woolley* case was recently reaffirmed by the Superior Court of New Jersey, Appellate Division in *Shebar v. Sanyo Business Systems Corporation*, 218 N.J. Super. 111 (1987). There, the Appellate Division extended the *Woolley* rationale to make all oral representations concerning policies or continued employment made by authorized management representatives enforceable. These decisions are well known to New Jersey practitioners and employers, and have been the basis for my advice to employers to add disclaimers to their manuals and explicitly affirm their right to consider all employment to be at will.

If you would like, I can send you copies of these cases that I cited for your review.

Very truly yours,

s/ Stephen R. Mills
Stephen R. Mills

SRM:bas

APPENDIX F — EXHIBIT P-9 - LETTER DATED MAY 10, 1988 FROM DONALD M. ROBBINS, ESQ. TO STEPHEN R. MILLS, ESQ.

May 10, 1988

VIA FACSIMILE

Donald M. Robbins, Esq.
Vice President and General Counsel
HASBRO, Inc.
1027 Newport Avenue
Pawtucket, Rhode Island 12862

Re: Al Quiroga

Dear Don:

This letter will confirm my conversation with you on May 9, 1988, wherein I expressed to you my dismay at the summary termination of my client, Mr. Al Quiroga, on that date. I note that this termination was conducted without notice to me and at a time when, based upon your written assurances, Mr. Quiroga and I were waiting for a written response from Hasbro to our settlement offer of April 19, 1988.

Since this termination was conducted in a summary fashion and in total and utter disregard of the Hasbro Personnel Manual, I can only conclude from the timing of these events that the discharge was in retaliation for Mr. Quiroga's assertion, in my letter of April 5, 1988, that he had been discriminated against because of his Hispanic background. Such an action by Hasbro, as you may know, constitutes an independent, actionable violation of Title VII of the Civil Rights Act of 1964 entitling Mr. Quiroga to reinstatement, back pay and attorneys' fees.

Appendix F

This letter will further confirm that I have extended your deadline to respond to my April 19, 1988 settlement offer to and including Monday, May 16, 1988. I have already made arrangements with the Equal Employment Opportunity Commission to meet with Mr. Quiroga and myself next week for the purpose of filing two Charges of Discrimination relating to your unlawful activities.

Very truly yours,

s/ Stephen R. Mills
Stephen R. Mills

SRM:bas

APPENDIX G — TRANSCRIPT OF PROCEEDINGS, DATED MARCH 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 89-1187

ALVARO QUIROGA,

Plaintiff

v.

PLAYSKOOL BABY, INC.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
TRIAL OPINION

VOL. 3 PAGE 223

Newark, New Jersey
March 5, 1990

BEFORE:
HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

STEPHEN R. MILLS
Attorney for the Plaintiff

Appendix G

MORGAN, BROWN & JOY,
BY: JAMES M. PAULSON,
Attorneys for the Defendant

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

HOWARD A. RAPPAPORT
Official Court Reporter

[224] THE COURT: Mr. Mills, have you had a chance to review the order on the summary judgment motion?

MR. MILLS: Yes, I have no objection to that.

THE COURT: All right, I guess that can dispose of that.

I apologize to counsel for the necessity to read an opinion into the record, but the limitations on typing facilities required that if I'm goind to do this in any reasonable amount of time I have to do it this way.

I'll read the opinion in the record and reserve the right to review it, make any changes or corrections which I think are appropriate before it is distributed to the parties and filed.

Plaintiff, Alvaro Quiroga, instituted this action against Hasbro and its subsidiary Playskool Baby, Inc. alleging violations of Title VII, 42 U.S.C. Section 2000, et seq., the New Jersey Law Against Discrimination ("NJLAD", N.J.S.A. 10:5, et seq.), the Age Discrimination in Employment Act "ADEA", 29 U.S.C.

Section 621, et seq.) and state claims of breach of contract and intentional infliction of emotional distress. Immediately prior to trial I granted defendants' motion for summary judgment on all of plaintiff's claims except his Title VII and comparable NJLAD claims based on the failure to award plaintiff stock options in 1988 and based on asserted retaliatory discharge.

[225] A non-jury trial on these remaining claims was held on February 27 and 28. This opinion constitutes my findings of fact and conclusions of law.

A. *The Facts*

Plaintiff is a citizen and resident of the state of Florida. At all times relevant herein, he was a citizen and resident of the state of New Jersey and was employed as a vice-president of defendant Playskool Baby, Inc. ("Playskool") for its manufacturing facilities in Wayne, New Jersey.

Plaintiff was born in Havana, Cuba on September 1, 1943. He emigrated to the United States in 1962 and subsequently became a United States citizen.

Defendant Hasbro, Inc. ("Hasbro") is a corporation organized under the laws of the state of Rhode Island, with its principal place of business in Pawtucket, Rhode Island.

Playskool is a corporation organized under the laws of the state of New Jersey, with its principal place of business in Northvale, New Jersey. Playskool is a wholly-owned subsubsidiary of Hasbro.

In September 1973 plaintiff became employed by Westland

Appendix G

Plastics in Newbury Park, California as a supervisor of the molding department. In 1978, at the time Arthur Guiness and Sons acquired Glenco Infnant Items and merged Westland into Glenco, plaintiff became vice-president of manufacturing operations. In early 1980 plaintiff, then an employee of [226] Glenco, relocated from California to New Jersey in conjunction with the transfer by Glenco of one of its manufacturing plants. Hasbro acquired Glenco Infant Items in August 1983. At about the time of Hasbro's acquisition of Glenco, plaintiff became employed as vice-president of operations for Playskool in Wayne, New Jersey. In that position he managed a manufacturing plant in Wayne. Edward Jaffe, formally an employee of and principal in Glenco became vice-president of operations for Playskool following the acquisition.

From approximately September 1978 through May 9, 1988 plaintiff reported to Edward Jaffe.

In the year 1982-1983 plaintiff's salary was $62,400. It increased regularly during the ensuing years and was at the annual rate of $92,365 when he left Hasbro in May 1988.

The uncontradicted evidence establishes that Hasbro considered plaintiff to be a valuable executive and a key element in the successful operation of its Wayne plant. Plaintiff, however, became dissatisfied with his role. Hasbro had made plans to open a plant in South Carolina and to place plaintiff in charge of the plant. For economic reasons the plan was abandoned but plaintiff viewed the change of plans as a failure to promote. Plaintiff perceived that his access to financial information in 1986 and 1987 was more limited than that of other executives; he asserted that his responsibilities concerning Hasbro's importing of goods from Asia had been [227] eliminated and that he had not been involved

in the presentation of Playskool's budget to Hasbro in 1988 or in the investigation of the closing of the Wayne plant in 1988. Plaintiff felt that his 1988 salary increase was inadequate and that his bonus was too small. There is nothing other than plaintiff's subjective feelings to suggest that any of these managerial decisions reflected any criticism of plaintiff by management or represented an attempt to downgrade his executive position in the company. On the contrary, plaintiff was viewed as a vital element in the plans for the Wayne plant's future operations. These real or imagined grievances were the subject of a summary judgment motion, but they provide a backdrop for the remaining Title VII discrimination charges arising out of the granting and withholding of stock options and plaintiff's departure from Hasbro.

The testimony of Hugh C. Maxwell, Hasbro's senior vice-president for engineering, and Alfred Verecchio, Hasbro's co-chief operating officer, establishes the circumstances of the withholding, the granting and the ultimate decision not to grant stock options to plaintiff.

Plaintiff's testimony and the testimony of William Daly, Hasbro's vice-president of industrial relations, establishes the circumstances of plaintiff's departure from the company. Both before and during the trial there has been a dispute between the parties whether plaintiff's departure was a [228] resignation or a termination. The ambiguity of the situation arises from the heavy handed way in which plaintiff and his attorney sought to extract the payment of a large sum of money from Hasbro. The facts are the facts and it is immaterial what label is used. Therefore I shall use the neutral term "departure" when referring to plaintiff's exodus from Hasbro.

As mentioned previously, in 1987 plaintiff was head of

operations at the Wayne facility. He reported to Mr. Jaffe, Playskool's vice-president of operations, whose offices were at the Northvale, New Jersey facility. It was the responsibility of Hugh Maxwell to recommend to Stephen Hasenfeld, then Hasbro's chairman of the board, those Playskool employees who should be awarded stock options in 1988. Plaintiff received a stock option award in August 1986, but in July 1987 Maxwell did not recommend stock options for plaintiff. He did not recommend that options be awarded to at least two other Playskool vice-presidents, Rodney Armstrong and Elliott Dorfman, neither of whom are Hispanic. There were a number of non-Hispanic officers who also were not recommended for options.

Maxwell did not recommend options for plaintiff because during the first quarter of 1987 plaintiff had committed the Wayne facility to overproducing product exceeding by far the company's manufacturing plan. As a result, Hasbro had to decide whether to close the plant, but after giving serious considerations to that course of action decided against it.

[229] Plaintiff testified that he saw a piece of paper which listed his name among the officers who were recommended initially for stock options. I conclude that either he was misinformed or else he misinterpreted what he saw on a sheet of paper. He clearly was not among the persons whom Hugh Maxwell recommended in July. Management concurred in Maxwell's July recommendations.

In January or February 1988 the option awards were announced and plaintiff was aggrieved to learn that he was not to receive any. He complained about it to his superior Edward Jaffe. A change of Playskool's management was being planned and Jaffe considered plaintiff to be a key person. In order that

the reorganization get off to a good start, Jaffe approached Hasbro's chairman of the board Hasenfeld and asked that stock options be granted to plaintiff. Maxwell was consulted. He was of the view that new conditions prevailed and that he would not oppose the request. Consequently, in March 1988 management agreed that it would recommend to the board of directors that plaintiff be included among those whose options would be granted. Board action was scheduled to take place at its April 20, 1988 meeting.

Meanwhile there unfolded the events which led to plaintiff's departure from Hasbro.

Jaffe was the superior officer of Playskool with whom plaintiff dealt on a daily basis. Management of the parent, [230] including Maxwell, Hasenfeld and Verecchia, were located in Hasbro's headquarters in Rhode Island and plaintiff dealt with them less frequently. In 1987 plaintiff discussed his dissatisfaction with various of the management decisions described earlier in this opinion. The discussions apparently became quite heated in January and February 1988 when plaintiff learned he was not going to be awarded stock options. He testified that he was unable to find out why. Also, according to his testimony, he became so discontented about the options and other matters that he told Jaffe that if he received no answers he would go to his attorney.

In March, after Jaffe had persuaded management to recommend to the board that stock options be granted to plaintiff, Jaffe informed plaintiff of the decision. At about the same time or shortly afterwards plaintiff retained an attorney. On April 5, 1988 the atorney wrote an extraordinary five-page letter to Jaffe asserting that plaintiff had "well-founded beliefs that he had been the victim of unlawful discrimination, the subject of harassment

in terms and conditions of his employment, and had been damaged by the breach of certain oral representations made to him in 1986." He recited plaintiff's distress about Hasbro's decision not to open a plant in South Carolina and instead to expand an existing plant in Pennsylvania. He recited plaintiff's complaints about a cut in his involvement in management's decision, the original [231] decision not to grant him stock options and the size of his 1988 raise and bonus.

The letter stated, "I would also point out to you in passing that Mr. Quiroga is of Hispanic origin and is thus subject to the protection of federal and state equal employment laws."

Then the letter stated that plaintiff "has clearly been the subject of discriminatory treatment, violation of your personnel manual, constructive discharge and breach of specific oral representations to him which are enforceable under New Jersey law. Notwithstanding all of the above, Mr. Quiroga has instructed me to request that I meet with you and an appropriate Hasbro representative to explore a possible settlement of Mr. Quiroga's claims against Playskool Baby and Hasbro. At this meeting I will be prepared to provide to you specific proposals for an outplacement arrangement for Mr. Quiroga that would obviate the necessity of any litigation. . . ." The attorney graciously undertook to refrain from commencing any legal action or filing a charge of discrimination for a reasonable time.

Not surprisingly, Hasbro's management interpreted the letter as an expression of plaintiff's intent to leave the company. Plaintiff testified that that was not what he intended, but I cannot conceive that an intelligent business executive would expect to continue very long with an employer to which he sent that kind of a letter.

Appendix G

[232] The letter evidenced a total lack of respect and confidence on plaintiff's part in his employer without which one cannot be an effective part of a management team. It also spoke of plaintiff's wish to enter into an outplacement arrangement. That can only be interpreted as contemplated departure from the company.

Nevertheless, Hasbro was anxious to retain plaintiff in its employas he was still considered to be an important executive at the Wayne facility. Upon the receipt of the letter, management in Rhode Island and Jaffe met to discuss the situation. They had the personnel department investigate all the issues raised in the letter, and they instructed Peter Schmidt of personnel to communicate with plaintiff to tell him that he understood plaintiff wanted to leave, but that the company would like to resolve the problems and keep him with the company.

William Daly, vice-president of industrial relations, met with plaintiff for lunch on April 13th. Plaintiff refused to discuss any of the issues contained in the letter without the presence of his attorney and thus nothing was accomplished.

Another meeting was held April 19th at LaGuardia Airport. Present were Daly and Jaffe, Hasbro's house counsel, plaintiff and his attorney.

Plaintiff's attorney stated that Hasbro had breached its contract to plaintiff by not following through on its plan [233] to move the plant to South Carolina and that plaintiff had authorized him to resolve the matter through outplacement. The company's representatives inquired why plaintiff could not remain and continue to run the Wayne plant. Plaintiff's attorney asserted that the trust bridge had been broken and that plaintiff could probably not continue with the company.

Appendix G

After discussion of plant relocation and plaintiff's chagrin about not being put in charge of the new plant in South Carolina, plaintiff and his attorney left the room. They returned after five minutes with a seven point proposition:

1. Plaintiff would remain at the plant for a transition period.

2. Plaintiff's package, excluding a company automobile but including benefits would be $112,000.

3. Plaintiff would release any claim that he had against the company.

4. Plaintiff would not ask for attorneys fees, but would receive three and a half years of salary and benefits, that is $392,000 plus $50,000 representing lost options.

5. Plaintiff would agree to a consulting arrangement at one half his annual salary.

6. Health, dental, life insurance benefits would continue for 18 months.

7. Plaintiff would agree upon a statement to be made to all employees. Plaintiff's attorney stated that he wanted [234] all issues resolved by June 1. Upon that note the meeting terminated.

Whatever plaintiff's secret intent may have been, Hasbro's management very resonably concluded that he was planning to leave the company's employ in the near future. Stock options are designed to secure long-term commitments of employees. For that reason they don't fully vest until five years after their issuance, 20 percent being exercisable on the first and on each of the next

four anniversary dates. Having concluded on the basis of the April 5th letter and the April 19th meeting the plaintiff was planning to leave, Verecchia decided that he could not present to the board of directors a management recommendation that stock options be issued to plaintiff. Consequently plaintiff's name was removed from the list presented to the board on April 20th and has was neither recommeded for nor granted stock options.

On May 2 1988 Hasbro's general counsel wrote to plaintiff's attorneys setting forth in summary fashion the reason for his view that there was no basis for plaintiff's claims that Hasbro had breached a contract with him by failing to relocate the company's facilities to South Carolina, that there was no basis for a claim of national origin discrimination, that he had not been subjected to constructive discharge by intolerable working conditions. The letter stated, "Notwithstanding our belief that Mr. Quiroga has no meritorious [235] legal claims, we will be responding to your offer to conclude his services upon Mr. Jaffe's return from a business trip to the Far East on May 9, 1988."

Hasbro's Wayne plant ws to play an important role in the company's plans for the years ahead. After considering the April 5th letter and the April 19th conference, Hasbro's management concluded that plaintiff did not wish to stay with Playskool and that they would have to find someone else to manage the Wayne plant during the period of development which lay ahead. They selected Lyle Klausner to fill the post and decided to let plaintiff go. Having concluded that there was no merit to any of plaintiff's legal claims, they decided to make no further response to plaintiff's attorney.

On May 9, 1988 Peter Schmidt, Edward Jaffe and Mr. Daly met with plaintiff in his office and informed him that they were

respecting his wishes to resign and that he was to leave that day. Plaintiff protested that he had not intended to leave the company and threatened to file the biggest discrimination suit ever filed against the company. Plaintiff's salary was continued thereafter until June 1, the date his attorney stated ws the deadline for a decision.

In due course plaintiff filed his suit. For good measure he added an age discrimination claim to the national origin discrimination claim.

As I mentioned at the outset of this opinion, I have [236] granted summary judgment in favor of defendants on all but two of plaintiff's claims. Because of the relative proximity in time between the April 5th letter which mentioned Title VII litigation and the withdrawal of the stock option recommendation and the departure of plaintiff, I concluded that there was a material issue of fact whether these two corporate actions werre in retaliation for threatening to institute a Title VII action. *Jalil v. Advel Corp.*, 873 F. 2d 701 (3d Cir. 1989).

B. *Legal Conclusions*

The Court has jurisdiction over this action pursuant to 28 U.S.C. Sections 1331 and 1332. Hasbro and Playskool are employers engaged in commerce and are subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000-e, et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5, et seq.

To establish a prima facie case for retaliatory discharge, a plaintiff must show i) that he engaged in a protected activity; ii) that he was discharged subsequent to or contemporaneously with such activity; and iii) that a causal link exists between the

protected activity and the discharge, *Jalil, supra.* The same analysis would be applicable to other adverse employer actions asserted to be retaliatory in nature, such as the revocation of the recommendation for stock options in the present case.

Here plaintiff engaged in a protected activity — the [237] assertion of Title VII claims and an expressed intent to institute proceedings to vindicate those claims. Adverse employer actions followed, namely revocation of the stock option recommendation. For the purposes of this analysis Hasbro's decision to cut short the dialogue with plaintiff and his attorney and to let plaintif go will be assumed to be the equivalent of termination of employement, although plaintiff's conduct as orchestrated by his attorney could very well be deemded a constructive or actual resignation.

Plaintiff, however, fails utterly to establish that his voicing of Title VII claims and his threat to institute discrimination proceedings were the cause of Hasbro's adverse actions.

The evidence establishes without a shadow of a doubt that Hasbro considered plaintif a key employee whom it wished to retain in charge of the Wayne plant. Hasbro persisted in this view even after it received the outlandish April 5th letter from plaintiff's attorney. Plaintiff's national origin and ability to communicate with employees in Spanish was considered a strong asset, not a detriment.

What we have here is a management person, plaintiff, who disagreed with decisions of top corporate management. He was disappointed with the decision not to pursue plans to relocate the New Jersey plant to South Carolina. He feld affronted with allocation of responsibilities to him. He was [238] aggrieved that

his faulty execution of the production goals of the first quarter of 1987 resulted in the initial decision not to recommend that he receive stock option for the year. He may well have been personally affronted by a failure on Jaffe's part to discuss fully with him the reasons for not recommending and later recommending options.

In those circumstances plaintiff had two responsible courses of action to take if he could not persuade his employers to accept his position on those questions. He could have accepted his employer's decisions, which were entirely within their province to make, and tried to do as good a job as he could. Or he could have resigned.

Instead plaintiff took his problems to an attorney who tried to force plaintiff's various grievances into the framework of various state and federal causes of action, none of which were supported by the fact. It doesn't appear that the national origin complaint was voiced or considered by plaintiff prior to his seeking legal counsel. That appears to have been an attorney construct which first surfaced in the attorney's Arpil 5th letter, tucked away among the lengthy dissertation concerning the failure to move the plant to Sout Carolina, the failure to award stock options and other grievances.

It is absolutely clear that Hasbro's decision to reverse the stock option decision and to let plaintiff go was not caused by his making claims of discrimination and by his [239] threats to sue on these claims. The decision were caused by plaintiff's actions which demonstrated that he could not be relied upon to remain in Playskool on a long-term basis and to fulfill the responsibilities which had been projected for him at the Wayne plant.

Appendix G

Since plaintiff has failed to establish the third element of his retaliation claim, namely causation, it is unnecessary to determine whether his departure really was a termination by the company or a resignation by plaintiff.

The claims in this case are utterly without basis in law or in fact. I granted summary judgment in defendant's favor on most of them. The evidence at the trial of the case of the remaining two claims shows that in April 1988 plaintiff and his attorney were demanding that Hasbro pay nearly $400,000 and confer upon plaintiff other economic advantages in order that plaintiff not act on his and his attorney's threat to bring a lawsuit asserting claims which we now know, and investigation then should have shown, had no basis in law or in fact. Were plaintiff's economic position not so precarious I would suggest that defendants apply for an award of attorney's fees against him. However, in light of the fact that he has been out of work since his departure, that would probably be useless expenditure of time and effort.

Defendant similarly will prevail both on the state and the federal claims. Their attorneys are requested to present a [240] form of order in the defendant's favor on all claims not dismissed by way of summary judgment.

All right. That will take case of that.

(2)

No. 91-417

In the Supreme Court of the United States

OCTOBER TERM, 1991

ALVARO QUIROGA,
PETITIONER,

v.

HASBRO, INC. AND PLAYSKOOL BABY, INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR HASBRO, INC. AND PLAYSKOOL BABY, INC. IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Should this Court disturb the findings entered by the U.S. District Court for the District of New Jersey, concurred in by the U.S. Court of Appeals for the Third Circuit, that: 1) petitioner's complaints of discriminatory treatment neither caused respondent Hasbro, Inc. to deny him stock options, nor caused his employment with respondent Playskool Baby, Inc. to cease; and 2) petitioner's action was groundless, and justified an award of attorneys' fees to respondents?

LIST OF PARTIES

Respondent Hasbro, Inc. ("Hasbro") has no parent companies. Hasbro is engaged in numerous joint ventures as a result of which it has less than 100% ownership of the following entities: Playskool Royal Industries, Inc.; Interactive Video; Nanhai County, Yongnan Toy Manufacturing Co. Ltd.; Buji Soft Toys Company Ltd.; J.W. Spear & Sons PLC; Pierwall, Ltd.; Anibal E. Abrantes, SARL; Funskool (India) Ltd.; and Bangkok Toy Manufacturing Ltd.

Hasbro is the parent company of Respondent Playskool Baby, Inc. ("Playskool"). Playskool is engaged in a joint venture with Hasbro as a result of which it has less than 100% ownership of Playskool Royal Industries, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous:

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OPINIONS BELOW

In addition to the opinions described in the petition, the United States Court of Appeals for the Third Circuit has issued an opinion on Hasbro's[1] motion for attorneys' fees incurred in

[1] Except as otherwise indicated, reference to "Hasbro" is to both Hasbro and Playskool.

defending the appeal on the merits (Appeal No. 90-5284) to that court. That opinion is reprinted herein as Appendix A.

STATUTORY PROVISIONS INVOLVED

In addition to those set forth in the petition, the following statutory provision is pertinent:

> In any action or proceeding under this title, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. §2000e-5(k).

STATEMENT OF CASE

A. *Introduction*

In his statement of the case, and elsewhere in his petition, petitioner Alvaro Quiroga ("Quiroga") makes several material omissions and misstatements regarding the proceedings below. In accordance with Rule 15.1 of this Court's rules, Quiroga's misstatements are identified in the Statement of Case and Argument sections.

B. *Factual Background*

Quiroga is a native of Cuba and emigrated to the United States in 1962. (Appendix to Petition ("App.") 49a) From 1983 through 1988, he was Vice President of Operations for a Playskool manufacturing plant in New Jersey. (*Id.* at 4a-5a,

49a-50a) Quiroga was a valued part of Hasbro's management team. (*Id.* at 4a-5a, 50a-52a, 55a, 59a)

In 1987, Quiroga became dissatisfied with a number of management actions, including, in early 1988, the failure to award him stock options. (*Id.* at 5a, 52a) Hasbro did not award Quiroga stock options because of his failure to follow the Company's manufacturing plan in 1987. (*Id.*) After Quiroga complained, Hasbro reconsidered, and decided to grant him options, subject to approval by the Board of Directors. (*Id.* at 5a, 52a-53a) Hasbro made this decision in order to get a reorganization of Playskool's management (of which Quiroga was a key part) off to a good start. (*See id.* at 52a-53a) The trial court did not find, nor was there any evidence in the record to support the conclusion, that Hasbro decided to award Quiroga options because he threatened to consult an attorney. (*Cf.* Petition, p. 7)

After learning that he was to receive options, Quiroga, for whatever reason[2], consulted Attorney Stephen Mills. On or about April 5, 1988, Attorney Mills sent an unsolicited letter to Playskool. (*Id.* at 5a, 53a) The letter listed various grievances, mentioned "in passing" that Quiroga was of Hispanic origin,[3] claimed that Quiroga had been constructively discharged, and suggested a meeting to discuss "an outplacement arrangement" for him. (*Id.* at 5a-6a, 39a-42a, 53a-54a)

Hasbro's management interpreted the letter as an announcement of Quiroga's intention to leave the Company. (*Id.*

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[2] In his petition, Quiroga asserts (p. 29) that he sought an attorney to obtain an explanation of the actions bothering him. Yet there is no evidence in the record that Attorney Mills ever asked Hasbro for any explanations. (*See* App. 39a-46a)

[3] This was the first time that Quiroga complained of being discriminated against on account of his national origin. Contrary to the petition's assertions (pp. 5-6, 17, 28, 31), there is nothing in the record which shows that the District Court clearly erred in finding that Quiroga did not complain of national origin discrimination prior to seeing Mills. (*See* App. 11a-12a, 60a)

For further discussion of this issue, *see infra* at 13.

at 6a, 54a) Quiroga finds this interpretation incredible (*see* Petition, pp. 22-24), however, as the District Court specifically found, the letter evidenced a lack of respect for Company management, and spoke of an outplacement arrangement. This could only be interpreted as departure from the Company. (*See* App. 55a)

Despite the April 5 letter, Hasbro did not seek to replace Quiroga. Rather, the Company investigated Quiroga's claims, tried to talk to him, and finally met with Quiroga and Mills on April 19. (*Id.* at 6a, 8a, 55a) At this meeting, both Attorney Mills and his client made plain what had been stated in the letter — that Quiroga would not continue with the Company.[4] Attorney Mills said the "trust bridge" between Quiroga and Playskool had been broken, and that Quiroga could probably not continue in Playskool's employ. (*Id.* at 6a, 8a, 55a-56a) Mills made a seven point "offer" involving payments to Quiroga of nearly $450,000. All the components of the "offer" were premised on Quiroga leaving the Company. (*See id.* at 6a, 56a) Contrary to what the petition implies (*see* p. 23), there is no evidence that either Quiroga or Attorney Mills stated at the April 19 meeting that Quiroga would remain in his job if he was not paid money for his claims.

Following the April 19 meeting, Hasbro concluded that it was in the Company's best interest to respect Quiroga's intention to leave. Hasbro concluded that one holding a position as important as Quiroga's should be willing to remain with the Company on a long-term basis. (*See* App. 9a, 57a, 60a)

Likewise, Hasbro removed Quiroga's name from the list of those to be awarded stock options at the next Board of Directors meeting. (*See id.* at 7a, 56a-57a) Stock options were reserved for outstanding employees with a long-term future at the Company. In light of Quiroga's stated intentions, it was no longer appropriate to award him options. (*See id.*)

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[4] Quiroga's petition is silent on this aspect of the meeting. (*See* Petition, pp. 8, 22-23)

On May 2, 1988, Hasbro's General Counsel wrote Attorney Mills, stating that the Company would be responding to his (Mills') offer to conclude Quiroga's services on May 9, 1988. (*See id.* at 57a) In his response, Mills made no effort to "correct" the reference to an offer to conclude services. (*See id.* at 43a-44a)

On May 9, 1988, Hasbro officials met with Quiroga and told him that they were respecting his wishes to resign, and that he was to leave the Company, effective immediately. (*See id.* at 57a-58a)

C. *Procedural Background*

On March 22, 1989 Quiroga filed suit in the U.S. District Court in Newark. His complaint alleged national origin discrimination, age discrimination and unlawful retaliation in violation of federal and state anti-discrimination law. He also alleged common law claims for breach of contract and intentional infliction of emotional distress. Summary judgment was granted on all these claims, save those for unlawful retaliation. (*See id.* at 2a, 48a-49a)

After a two-day bench trial, the District Court rendered its findings of fact and conclusions of law, and entered judgment for Hasbro. In its opinion, the District Court indicated that but for Quiroga's precarious financial situation, it would be appropriate to award Hasbro the attorneys' fees incurred in defending his baseless action. (*Id.* at 61a) In light of information indicating that Quiroga could in fact pay a fee award, Hasbro filed a motion for attorneys' fees. After discovery into Quiroga's financial circumstances, the District Court assessed $10,000 of Hasbro's attorneys' fees against Quiroga. (*See id.* at 9a-10a)

On February 13, 1991, the U.S. Court of Appeals for the Third Circuit affirmed the District Court on both the merits and award of attorneys' fees, and remanded for consideration of whether attorneys' fees should be assessed in whole or in

part against Attorney Mills. (*See id.* at 19a-36a) In response to Quiroga's petition for rehearing and suggestion of rehearing *in banc*, the original panel vacated its decision (*id.* at 37a-38a), and issued another opinion on June 11, 1991. The opinion on the merits (Appeal No. 90-5284) was identical to that in the earlier opinion. The opinion on the attorneys' fee issue (Appeal No. 90-5748) differed slightly from its earlier counterpart, but the outcome remained the same: affirmance and remand for possible reallocation of fees. (*See id.* at 1a-18a) Quiroga's subsequent petition for rehearing and suggestion of rehearing *in banc* was denied. (*See* Appendix B to this brief) On remand, the District Court has postponed any action, pending disposition of Quiroga's petition to this Court.

After prevailing in the Third Circuit, Hasbro filed a motion under Fed.R.App.P. 38 for the attorneys' fees incurred in defending the appeal. On September 6, 1991 the court allowed the motion as to the appeal on the merits, but not as to the appeal on the attorneys' fee issue. The court assessed the fee award personally against Attorney Mills. (*See* Appendix A to this brief)

REASONS FOR DENYING THE PETITION

A. Introduction — Quiroga's Petition Simply Rehashes Assignments of Error Appropriately Made to an Appellate Court.

This Court has frequently stated that certiorari should not issue to consider a petition which primarily presents questions of fact. *See NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938); *U.S.* v. *Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1923). Certiorari should not be used to address questions

which are only of importance to the litigants. *Rudolph* v. *U.S.*, 370 U.S. 269 (1968); *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. at 502. When a decision rests on findings concurred in by two lower courts, this Court has been particularly reluctant to disturb those findings. *See NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 98 n.15 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. at 178.

Quiroga's petition defies all these principles. Notwithstanding a single reference to this Court's power of supervision under Rule 10.1(a) (*see* Petition, p. 30), the petition entreats this Court only to review and reverse questions of fact — whether Quiroga's complaints of discrimination caused his alleged termination of employment, and his loss of stock options. These questions are of importance to the litigants, but rest on unique facts which are unimportant to the public. Moreover, the findings on causation have been concurred in by both the District Court and Appeals Court, and thus are entitled to exceptional deference.

It is with great reluctance, then, that Hasbro responds to the many assignments of error set forth in the petition. Among other things, Quiroga characterizes the Third Circuit's opinion as "deceitful" (*see* Petition, p. 23), claims that the Third Circuit did not carefully review the record (*see id.* at 31, 42), and criticizes that court for not summarily reversing the District Court (*see id.* at 16), when he himself did not seek such relief. Notwithstanding these and other arguments, there is no basis for disturbing the findings of the District Court, concurred in by the Third Circuit.

B. A Writ Should Not Issue to Review Whether Quiroga's "Protected Conduct" Caused Him to Lose His Job and Stock Options.

1. *Quiroga has not Shown that the Third Circuit Committed Clear Error in Upholding the District Court's Findings on Causation.*

The short answer to Quiroga's assignments of error is that the District Court did not clearly err in finding no causal link between his protected activity and the loss of his job and stock options. Hasbro's witnesses testified that the April 5 letter of Quiroga's counsel, coupled with the statements made at the April 19 meeting, demonstrated that Quiroga had no intention of remaining with Playskool. Because Hasbro wanted someone in the important position of plant manager who was willing to remain on a long-term basis, it chose to accept what it characterized as his resignation. Likewise, Hasbro decided not to grant Quiroga stock options because they are awarded to employees who, unlike Quiroga, wanted to remain with the Company. (*See* App. 7a-9a, 59a-61a)

Quiroga appears to make two principal claims of error. He first asserts (Petition, p. 16) that the District Court clearly erred with respect to causation by initially ruling in his favor on Hasbro's motion for summary judgment, but later ruling against him when all the evidence had been heard. Quiroga is confused. On the motion for summary judgment, the District Court, of course, viewed all the evidence in the light most favorable to Quiroga. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). At trial, Quiroga's claims were judged by a more rigorous standard. Absent the lenient view available in the summary judgment setting, Quiroga's claims failed, and nothing about this common circumstance merits review by this Court.

Second, Quiroga finds it inconceivable (Petition, p. 22) that his attorney's April 5 letter and the meeting of April 19 could

be interpreted as contemplating departure. He offers nothing to support this conclusion, however. By contrast, the District Court explained that "[t]he letter evidenced a total lack of respect and confidence on [Quiroga's] part in his employer without which one cannot be an effective part of a management team. It also spoke of [Quiroga's] wish to enter into an outplacement arrangement. That can only be interpreted as contemplating departure from the company." (App. 55a) In addition, the letter charged that Quiroga had "been the subject of a constructive discharge" (*id.* at 42a) — i.e., his working conditions were so intolerable that no reasonable person could be expected to endure them. *See Spangle* v. *Valley Forge Sewer Authority*, 839 F.2d 171, 173 (3rd Cir. 1988).

With regard to the April 19 meeting, Quiroga ignores (*cf.* Petition, p. 22) certain salient facts. At the meeting, Attorney Mills asserted that Hasbro had breached its "trust bridge" with Quiroga, and that Quiroga probably could not continue on. (App. 6a, 55a) Moreover, all components of the "settlement proposal" depended on Quiroga leaving the Company. (*See id.* at 6a, 56a) Neither Mills nor Quiroga made any proposal under which Quiroga would have remained with Playskool. Indeed, the reference to "constructive discharge" in the April 5 letter left little doubt about the course of action Quiroga would have taken had he not received a sum of money to his liking — resign, and claim intolerable working conditions premised on unlawful discrimination.[5]

As he did below, Quiroga makes numerous claims of error by the District Court. For one, he claims that the court refused to treat his complaints of discrimination as protected conduct under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* ("Title VII"). (*See* Petition, pp. 20-21) In fact, the District Court explicitly found that Quiroga engaged in

[5] Under these circumstances, the fact that Mills and Quiroga spoke about resignation as part of a settlement proposal (*cf.* Petition, p. 23) did not make it unreasonable for Hasbro to conclude that Quiroga would leave the Company absent a "settlement."

protected conduct under Title VII. (*See* App. 59a) What the District Court could not accept was that Hasbro had to employ a vice president who no longer wanted to stay with the Company. Regardless of whether the letter and the meeting "were absolutely protected," as Quiroga claims, without supporting authority (*see* Petition, p. 20), there is no basis for disturbing the District Court's findings on causation.

Quiroga also attacks the District Court for its discussion of the "responsible courses of action" open to him. (*See* App. 60a) The District Court found that Quiroga, after voicing his complaints prior to visiting Mills, should have either accepted his employer's position, or resigned. (*See id.*) This analysis was premised on the conclusion that the discrimination claims raised in the April 5 letter were nothing more than "an attorney construct." (*Ibid.*) Under these circumstances, the District Court properly found that Quiroga acted irresponsibly in complaining of discrimination. *See Monteiro* v. *Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir. 1980). *See also Novotny* v. *Great American Federal Savings & Loan Association*, 539 F.Supp. 437, 451 (W.D.Pa. 1982).

On top of attacking its findings, Quiroga even attacks the District Court (*see* Petition, pp. 10, 20) for statements made during closing arguments, in which the court characterized his attorney's April 5 letter as crazy, and his "settlement proposals" as extortion. In so doing, Quiroga ignores the fact that he and his attorney presented two choices to Hasbro in April 1988: either meet his demands for almost $450,000, or else he would resign, claim constructive discharge, and sue. This is a fair definition of extortion. (*See Webster's Third New International Dictionary of the English Language* (1961), defining "extort" as "obtain[ing] from an unwilling or reluctant person by . . . intimidation . . ."). As for the reference to the letter as "crazy," the results of the letter, when weighed against the benefits achieved for Quiroga by it, show the soundness of the District Court's judgment.

In sum, Quiroga's petition simply asks this Court to review the record and make factual determinations contrary to those made by two lower courts. He has not shown why the Court's reluctance to intervene in disputes of this kind should be overcome. The petition for a writ of certiorari should thus be denied.

2. *The Questions Presented Are Either Insignificant or Not Properly before this Court.*

The questions which Quiroga proposes to put before this Court on the retaliation issue are either insignificant or irrelevant. The first question essentially asks if Title VII protects against retaliation; this hardly merits examination by this Court. The second and third questions[6] present issues which are not raised by the Third Circuit's opinion. Neither the Third Circuit nor the District Court doubted that Quiroga engaged in protected activity. What they addressed was whether the protected conduct was causally linked to the alleged termination and denial of stock options (*see* App. 7a-9a, 58a-61a) — purely factual issues which are only of interest to the parties. As for the merits of Quiroga's underlying claims of discrimination, this again is not an issue raised by the opinions below. As stated, those opinions addressed the causal link between Quiroga's protected conduct and the alleged adverse employment actions.

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[6] Those question are:

> Does Title VII's protection against retaliation also extend to the right of an employee to retain counsel and engage in settlement negotiations with an employer to resolve Title VII claims?
>
> Must plaintiff also establish that his perceived Title VII claims are meritorious in order to prove a cause of action for retaliatory termination under Title VII?

C. The Third Circuit Did Not Err in Upholding the District Court's Award of Attorneys' Fees, Entered on the Ground that Quiroga's Suit was Without Foundation.

Quiroga's argument regarding the award of attorneys' fees appears to be in two parts. His first claim is embodied in his first question presented on the issue,[7] namely, that he should have prevailed on the merits of his retaliation claim, thus making an award of attorneys' fees inappropriate. Hasbro disagrees with Quiroga's view of the record, and the propriety of this Court reviewing such a question, for the reasons discussed above.

Quiroga's central argument appears to run as follows: he complained about discrimination prior to his attorney's April 5 letter, and his testimony on this score was not challenged. Thus, a court cannot conclude that his Title VII claims are meritless. This argument contains both legal and factual flaws.

First, Quiroga misapprehends the grounds upon which attorneys' fees were awarded. The District Court awarded fees under §706(k) of Title VII, 42 U.S.C. §2000e-5(k). As the Third Circuit recognized (*see* App. 11a), attorneys' fees are awarded to a prevailing defendant under this statute if the action is meritless, frivolous, unreasonable or without foundation, regardless of whether it was brought in bad faith. *See generally Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978). Thus, even if Quiroga complained in good faith about discrimination on the basis of national origin and/or age prior to the April 5 letter, this does not establish that the claims of discrimination asserted in the complaint passed the *Christiansburg* standard.[8]

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[7] The first question reads, "When the entire trial record discloses that respondents violated Title VII by retaliating against petitioner, did the District Court and Court of Appeals err in imposing sanctions against plaintiff and/or his attorney."

[8] Quiroga's misunderstanding is reflected in his second question presented

The petition implies (*see, e.g.*, p. 31) that Quiroga's claims of discriminatory treatment went unrebutted at trial, and thus had to be accepted by the District Court. This is preposterous. The District Court granted summary judgment on many of Quiroga's underlying claims of discrimination, none of which Quiroga appealed, save the stock options issue, which went to trial. These claims (alleged limitation of responsibilities, inadequate pay increase, inadequate bonus, alleged failure to promote) were not at issue at trial, and were only admitted for purposes of background on the retaliation issue. The retaliation claims, which were at issue, were addressed by Hasbro's witnesses. Quiroga is the one who never rebutted their testimony.

The premise of Quiroga's argument — that he complained of national origin discrimination prior to the April 5 letter — is also spurious. Quiroga has neither cited nor appended to his petition any materials which would indicate that the District Court clearly erred in finding that the complaint of *national origin* discrimination was voiced or considered by Quiroga prior to seeking counsel. (*See* App. 11a-13a, 60a)[9] Even if

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on the attorneys' fee issue, which wrongly assumes that subjective bad faith is a prerequisite to an award of attorneys' fees under Title VII. As with his questions on the retaliation issue, this question is not properly before the Court. In any event, the petition offers no authority for the proposition that §706(k) of Title VII somehow prohibits a court from imposing fees and/or sanctions in a Title VII case on other grounds. *Cf. Christiansburg Garment Co.* v. *EEOC*, 434 U.S. at 419 and n.13.

[9] Moreover, the record supports the District Court's findings on this issue. At trial, Quiroga testified at length to the events preceding his attorney's letter. He first mentioned the word "discrimination" when he testified that he told his superior in 1988 that he was "tired of the harassment and discrimination and unfair treatment they did to me last year." (Trial Transcript, February 27, 1990, p. 94) Quiroga later changed his testimony to state that he told his superior "that I would be seeking for an attorney if this continues and I will file charges of discrimination, or take it to wherever has to be taken." (*Id.* at 104) In neither instance did Quiroga specify the basis of the alleged discrimination. By contrast, two Hasbro officials testified that they were not informed, prior to the April 5 letter, that Quiroga had complained of unlawful discrimination. (*See id.* at 28, 47, 60) Given the contradictions between Hasbro's testimony and Quiroga's testimony, and the contradictions within

Quiroga had testified to this effect, the District Court was not *required* to believe him. *See* Wright & Miller, 9 *Federal Practice and Procedure*, §2586 at 736 (1971), *citing Guzman* v. *Rurz Pichirilo*, 369 U.S. 698, 702 (1962).

Quiroga further cites to a handful of cases in which attorneys' fees have been awarded, and implies that because these cases differ from the present action, a fee award is inappropriate. (*See* Petition, pp. 37-38) Citing to a handful of attorneys' fees cases establishes nothing, given the fact specific inquiry required. In any event, other courts have awarded attorneys' fees to employers when the causation element of a retaliation claim was not proven. *See Swint* v. *Volusia County - Department of Public Works*, 36 Fair Empl.Prac. Cas. (BNA) 1412, 1415-1416 (M.D.Fla. 1984); *Hunter* v. *Effingham County Board of Education*, 33 Fair Empl. Prac. Cas. (BNA) 67, 72-73 (S.D.Ga. 1983); *Davidson* v. *Allis Chalmers Corp.*, 567 F.Supp. 1532, 1539-1540 (W.D.Mo. 1983).

Finally, Quiroga seems to argue (*see* Petition, pp. 40-42) that because nothing in this case resembles the misconduct found worthy of sanctions in *Chambers* v. *NASCO, Inc.*, ____ U.S. ____, 111 S.Ct. 2123 (1991), then sanctions are inappropriate in this action. This argument ignores the fact that sanctions are imposed on a case by case basis. In any event, the District Court did not impose attorneys' fees under its inherent powers; the Third Circuit only remanded the case to the District Court to consider this issue, among others, given the frivolousness of the suit, and the apparent responsibility of Attorney Mills for what transpired. (*See* App. 13a-15a) Any arguments on this score are appropriately directed to the District Court.

"The one common strand running through [cases involving awards of attorneys' fees to employers] is that assessment of frivolousness and attorneys' fees are best left to the sound dis-

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Quiroga's own testimony, the District Court did not clearly err in finding that the complaints of national origin discrimination were an apparent "attorney construct." (*See* App. 60a)

cretion of the trial court after a thorough evaluation of the record and appropriate fact-finding." *Arnold* v. *Burger King Corp.*, 719 F.2d 63, 66 (4th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). Here, the District Court was in the best position to judge the merits of Quiroga's case. Quiroga has offered nothing but unsupported and unsound assertions to support his claims of error. A writ of certiorari should not issue.

CONCLUSION

For all the above reasons, Quiroga's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — Opinion of the United States Court of Appeals for the Third Circuit Filed September 6, 1991

FILED SEPTEMBER 6, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-5284 AND 90-5748

ALVARO QUIROGA,

APPELLANT,

v.

HASBRO, INC. and PLAYSKOOL BABY, INC.

ON MOTION BY APPELLEES HASBRO, INC. and PLAYSKOOL BABY, INC. FOR DOUBLE COSTS AND ATTORNEYS' FEES
(D.C. Civil Action No. 89-01187)

Appeal Submitted Pursuant to Third Circuit Rule 12(6) On May 31, 1991

Motion Submitted Pursuant to Third Circuit Rule 11.1.

Before: HUTCHINSON, NYGAARD and ROSENN,
Circuit Judges

(Opinion Filed September 6, 1991)

STEPHEN R. MILLS, ESQUIRE
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Attorney for Appellant

JAMES M. PAULSON, Esquire
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Boston, MA 02108
Attorney for Appellees

OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

On June 11, 1991 we issued our opinion affirming the district court's judgment in Appeal No. 90-5284 rejecting Quiroga's claim that the Hasbro defendants unlawfully retaliated against him for asserting rights under Title VII, 42 U.S.C.§§2000e-2000e-17, by discharging him. In Appeal No. 90-5284 we affirmed the district court's order awarding $10,000 in attorneys' fees to the Hasbro defendants, but remanded to the district court for it to consider whether the fee should be levied against Quiroga, his counsel, Stephen R. Mills, or both. *Quiroga* v. *Hasbro, Inc. and Playskool Baby, Inc.*, 934 F.2d 497 (3d Cir. 1991). On July 5, 1991 we denied Quiroga's Petition for In Banc Rehearing.

We are now asked by the Hasbro appellees, under Fed. R. App. P. 38, and Rule 27 of this court to award them attorney's fees and double costs to be paid by Attorney Stephen R. Mills. We will award attorney's fees in Appeal No. 90-5284 only, plus costs.

I.

Federal Rule of Appellate Procedure 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

We apply an objective standard to determine whether an appeal is frivolous. *Hilmon Co.* v. *Hyatt International*, 899 F.2d 250, 253 (3d Cir. 1990). An appeal is frivolous if it is wholly without merit. *Sauers* v. *Commissioner of Internal Revenue*, 771 F.2d 64, 70 n. 9 (3d Cir. 1985), *cert. denied* 476 U.S. 1162 (1986). A Rule 38 damage award may be assessed against an appellant's attorney. "The test is whether, following a thorough analysis of the record and careful research of the

law, a reasonable attorney would conclude that the appeal is frivolous." *Hilmon*, 899 F.2d at 254.

When the district court rejected all of Quiroga's claims, it found them to be utterly without basis in law or in fact and entered judgment for Hasbro. When we affirmed the order we described Quiroga's suit as "obviously frivolous," and concluded that the parties and the court were subjected to unnecessary expense and inconvenience. *Quiroga*, 934 F.2d at 504.

We described Quiroga's contentions in appeal No. 90-5284 as without support in the record. *Quiroga*, 934 F.2d at 500. "Quiroga presented only his subjective belief, but absolutely no supporting evidence that Hasbro's motives [in discharging Quiroga] were improper." *Quiroga*, 934 F.2d at 502. This was known to Quiroga's attorney before he filed the appeal. Careful analysis of the record and research of the law should have led him, as it would any reasonable attorney, to conclude that he simply had no legal and factual basis for the lawsuit. A reasonable attorney would have concluded that Appeal No. 90-5248 was wholly devoid of merit.

Upon that conclusion our inquiry ends and Rule 38 Sanctions become appropriate. It would be fundamentally unfair to Hasbro if we permit Quiroga to compel Hasbro to court to defend an appeal that is wholly devoid of merit, without facing sanctions for doing so. It is a hollow victory indeed for an appellee who successfully defends a frivolous appeal, if it is then further penalized by fee payments to its own attorney. Accordingly, we will award attorney's fees in Appeal No. 90-5284 only, plus costs, as a sanction for pursuing a frivolous appeal.[1]

Finally, Hasbro submits that Quiroga's counsel, Stephen R. Mills, should be required to pay the award of fees and costs.

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[1] We will not impose sanctions in appeal No. 90-5748. Quiroga presented a marginal argument which, albeit poorly articulated, raised a "colorable argument." See *In Re Halls' Motor Transit Co.*, 889 F.2nd 520, 523 (3rd Cir. 1989).

We agree. We have already concluded that Rule 38 awards can be assessed against counsel. *Hilmon*, 899 F.2d at 253-254. Such an assessment is especially appropriate here, for we have already found that filing the action

> without any foundation in law or fact was as much Attorney Mills' fault as it was Quiroga's. Mills, as a trained lawyer, should have known better. He proceeded with an obviously frivolous lawsuit, after putting his client's job and future at great risk, and also subjected the parties and the court to unnecessary expense and inconvenience.

Quiroga, 934 F.2d at 504.

We concluded in *Hilmon* that

> attorneys have an affirmative obligation to research the law and to determine if a claim on appeal is utterly without merit and may be deemed frivolous. We conclude that if counsel ignore or fail in this obligation to their client, they do so at their peril and may become personally liable to satisfy a Rule 38 award.

Hilmon, 899 at 254.

As the Court of Appeals for the Seventh Circuit recently observed:

> the frequency with which federal judges are imposing sanctions for abuse of federal court process has increased markedly in recent years. The reasons are systemic. As the federal courts become more and more overloaded, the costs imposed on ethical and responsible litigants when judicial resources are diverted to the processing of frivolous claims and defenses mount higher and higher. Moreover, as the bar and the judiciary both expand, the incentive for self-regulation by lawyers that comes from appearing regularly before the same judges diminishes,

> making judicial regulation by sanctions increasingly necessary. We are in a transitional period, and some members of the bar still do not realize that the judicial attitude toward attorney misconduct has stiffened. They had better realize it.

Hill v. *Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1203 (7th Cir. 1985).

Accordingly, a judgment will be entered in favor of Hasbro, Inc. and Playskool Baby, Inc., for attorney's fees in the amount of $11,796.00 and costs in the amount of $394.08 against Stephen R. Mills, attorney for appellant.[2]

A True Copy
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[2] Attorney Mills does not challenge the amount of damages requested by Hasbro, only the propriety of the sanction.

APPENDIX B — Order of the United States Court of Appeals for the Third Circuit Entered July 5, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-5284 AND 90-5748

ALVARO QUIROGA,

APPELLANT,

v.

HASBRO, INC. and PLAYSKOOL BABY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Action No. 89-01187)

Submitted Under Third Circuit Rule 12(6) On August 31, 1990

SUR PETITION FOR REHEARING

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROSENN, *Circuit Judges.*[*]

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the

[*] Judge Rosenn voted only on panel rehearing.

court in banc, the petition for rehearing is denied.

By the Court,

s/
Circuit Judge

Dated: JUL 5 - 1991